

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

- - -

MARK BROACH, . Case No. 1:12-cv-066  
Plaintiff, .  
- v - . Cincinnati, Ohio  
CITY OF CINCINNATI, . Wednesday, August 28, 2013  
9:51 a.m. Session  
Defendant. . **Day 6 of Jury Trial**  
..... **Morning Session**

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE STEPHANIE K. BOWMAN, MAGISTRATE JUDGE,  
AND JURY

APPEARANCES:

For the Plaintiff: ALPHONSE A. GERHARDSTEIN, ESQ.  
JENNIFER L. BRANCH, ESQ.  
JACQUELINE GONZALEZ-MARTIN, ESQ.  
Gerhardstein & Branch Co., LPA  
432 Walnut Street, Suite 400  
Cincinnati, Ohio 45202

For the Defendant: AUGUSTINE GIGLIO, ESQ.  
JESSICA L. POWELL, ESQ.  
Assistant City Solicitors  
Room 214 City Hall  
801 Plum Street  
Cincinnati, Ohio 45202

Also Present: Mark Broach  
Roy E. Winston, Assistant Fire Chief

Law Clerk: Joan P. Brady, Esq.

Courtroom Clerk: Jan Lahley

Court Reporter: Mary Ann Ranz  
810 Potter Stewart U.S. Courthouse  
100 East Fifth Street  
Cincinnati, Ohio 45202

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1 WEDNESDAY, AUGUST 28, 2013

2 Sixth Day of Jury Trial

3 P R O C E E D I N G S

4 BEFORE THE JURY: (9:51 A.M.)

5 THE CLERK: Judge, can I pass out the books first?

6 THE COURT: Yes, please.

7 All right. Thank you.

8 Because we had an overnight break, I just want to remind  
9 you you're still under oath.

10 THE WITNESS: Yes.

11 THE COURT: All right. Ms. Powell, whenever you're  
12 ready.

13 MS. POWELL: Thank you.

14 LIEUTENANT DAVID A. LEMONS

15 a witness herein, having previously been sworn, resumed the  
16 stand and continued to testify as follows:

17 DIRECT EXAMINATION (Continued)

18 BY MS. POWELL:

19 Q. Morning, Lieutenant Lemons.

20 A. Good morning.

21 Q. Okay. I'm going to start off this morning by having you  
22 go back to the Defendant's Exhibit No. 4.

23 A. Okay. My summary?

24 Q. Yes. I am going to have you go to your summary page.

25 A. Okay.

1 Q. Okay. So, this is a three-page document, is that right?

2 A. Yes, ma'am.

3 Q. And what is on the third --

4 The first two pages is your written summary, is that  
5 correct?

6 A. That's correct.

7 Q. And so what is on the third page of your summary?

8 A. That would be Lieutenant Broach's disciplinary history.

9 Q. And is it typical --

10 I mean, why would you attach that to a summary?

11 A. Just so the -- my assistant chief would be able to read  
12 the entire history of this employee.

13 Q. And is that something you did just for Lieutenant Broach,  
14 or do you do this for all of your summaries?

15 A. We do it for all the summaries.

16 Q. Okay. And do you know if this page 3 of your memo, do you  
17 know if this is all of Lieutenant Broach's disciplinary  
18 history?

19 A. To my knowledge.

20 Q. Okay. I'm gonna have you move on, talk a little bit about  
21 did you ever play any role in going through Lieutenant  
22 Broach's locker?

23 A. Yes, I did.

24 Q. When was that?

25 A. Hmm, I can't recall the date exactly.

1 Q. Do you remember if it was after, before, during your  
2 investigation?

3 A. I'm thinking it was after the investigation. Somewhere  
4 around September, October.

5 Q. And you I think -- I believe you testified yesterday you  
6 were aware that Lieutenant Broach was on stress leave?

7 A. Yes, ma'am.

8 Q. So, do you remember if Lieutenant Broach was still on  
9 stress leave when you searched his locker?

10 A. This may have been after he was removed from -- he was  
11 ordered to take a psychological evaluation. Fitness for duty.

12 Q. Okay.

13 A. It may have been during that time.

14 Q. But do you know for certain?

15 A. I don't know for certain, no.

16 Q. Let me ask you this. Do you remember the circumstances of  
17 why you would have gone through Lieutenant Broach's locker?

18 A. It was at the request of Captain Campbell. He was missing  
19 some documents, some performance ratings, that should have  
20 been submitted by Lieutenant Broach.

21 Q. And why would Lieutenant -- or why would Captain Campbell  
22 ask you to get involved in looking at the locker?

23 A. He just wanted a witness and everything documented.

24 Q. And is that --

25 Why would you need a witness, or why would you want a

1 witness for that?

2 A. In case that person comes back and says something was  
3 planted in his locker, and there's a witness and everything's  
4 documented.

5 Q. Okay. Do you recall whether the -- your search of  
6 Lieutenant Broach's locker came up in your meetings with the  
7 EEO?

8 A. Yes, it did.

9 Q. Okay. If they came up with the meetings -- they came up  
10 at the meetings with the EEO, does that mean it was before or  
11 after the fitness-for-duty evaluation was made?

12 A. It would have been before.

13 Q. Okay. Does that help you remember any better as to why?

14 A. Yeah. It was before. Probably June.

15 Q. Okay. And what did you find when you looked through the  
16 locker?

17 A. We found some inspection -- building inspections and  
18 performance ratings that we were looking for.

19 Q. And what did you --

20 What was your conclusion when you found those documents?

21 A. That he shouldn't have had official documents in his  
22 personal locker.

23 Q. And when you talk about "official documents," the  
24 performance evaluations are one, is that right?

25 A. Right. They're kept in the office.

1 Q. And the performance -- the building inspections?

2 A. They're to be kept in the office.

3 Q. Okay. And we need to be careful about not talking over  
4 each other for the court reporter.

5 But can you explain what the building inspection documents  
6 were?

7 A. They're just records of building inspections that the fire  
8 company may have gone through.

9 Q. Okay. And are lockers private at the fire department?

10 A. Yes, ma'am.

11 Q. So does the department have a right to search them?

12 A. If there's a need, yes.

13 Q. And in this case what was your need to search Lieutenant  
14 Broach's locker?

15 A. To look for the performance ratings of his members.

16 Q. Now, you're aware that Lieutenant Broach filed a complaint  
17 of discrimination with the city HR office, is that right?

18 A. Yes, ma'am.

19 Q. And when did you become aware of that?

20 A. Shortly after his return to duty.

21 Q. So was that -- do you remember what -- when that was?

22 A. I can't give you a specific date.

23 Q. Did you know about that EEO complaint when you were doing  
24 the investigation of the Ludlow fire?

25 A. No, I did not.

1 Q. And how did you become aware of those EEO charges with the  
2 city?

3 A. Lisa Berning brought them to my attention.

4 Q. And was there anybody in the HR Division that told you?

5 A. My assistant chief, yes.

6 Q. Who would you have heard from first?

7 A. My assistant chief.

8 Q. And this was --

9 Again, the time frame was when?

10 A. I can't recall the time frame.

11 Q. Okay. And did you play any role in the EEO meetings?

12 A. Yes, I assisted Ms. Berning with the -- our terminology  
13 and our policies and procedures.

14 Q. Why would you need to do that?

15 A. Like we've been going through the last couple days where  
16 you mention firefighter terms you weren't aware of.

17 Q. Can you just explain that in generic terms to the jury in  
18 terms of what you mean?

19 A. Just how we operate on a daily basis. You guys wouldn't  
20 understand some of the terminology. I was there to kind of  
21 help her with the terminology.

22 Q. Did you have any role as an investigator at those  
23 meetings?

24 A. No, I didn't.

25 Q. Would you have had an ability to bring charges out of

1 those meetings?

2 A. No, I wouldn't.

3 Q. Besides attending the EEO meeting for Lieutenant Broach,  
4 have you attended other firefighter EEO meetings?

5 A. Yes, I have.

6 Q. And how many EEO meetings did you attend for Lieutenant  
7 Broach?

8 A. Four.

9 Q. So four meetings?

10 A. Yes, ma'am.

11 Q. And those took place where?

12 A. At Centennial --

13 Q. Is that --

14 A. -- Resources --

15 Q. I'm sorry?

16 A. Human Resources Department.

17 Q. Okay. And can you talk a little bit about -- I'm gonna  
18 have you talk about each of those meetings to the best of your  
19 knowledge.

20 I'm going to have you start by explaining when was the  
21 first meeting that you remember having?

22 A. I can't recall the dates, but I know the parties that were  
23 there. The first meeting was myself, Lieutenant Broach, and  
24 Lisa.

25 Q. And what was your understanding of the purpose of that



1 meeting?

2 A. To get an understanding of Lieutenant Broach's complaint.

3 Q. And did you learn the basis or did you gain an  
4 understanding of Lieutenant Broach's complaint at that  
5 meeting?

6 A. No, we did not.

7 Q. What did you learn?

8 A. We -- that he wanted to relitigate all the discipline he's  
9 had in his history, basically.

10 Lisa continued to ask him for the basis for his EEO  
11 complaint. "That's what we're here for." All these incidents  
12 have been heard and he has had his appeals and he lost his  
13 appeals. "Okay, now we're moving forward to your complaint  
14 today." And he said he had a stack of evidence that he wanted  
15 to bring in. And she was "Okay, that's good. That's what we  
16 want. We want to get to the bottom of this complaint." And  
17 he continued to go on about the cases that he had in his  
18 history and he wanted to relitigate the cases that were  
19 already closed.

20 Q. And when you talk about "cases," what are you referring  
21 to?

22 A. Prior disciplines he's had throughout his career.

23 Q. And you said that he, Lieutenant Broach, indicated he had  
24 a stack of evidence he would bring to a meeting?

25 A. Yes. The next meeting he would bring a stack of evidence.

1 Q. And any next meetings that you had with the EEO concerning  
2 Lieutenant Broach, did he bring any stacks of evidence?

3 A. He brought a -- maybe a 4 x 4 index card or piece of paper  
4 with some writing on it, and we were both, like, Where's the  
5 stack of evidence that's to support your charges? And he said  
6 he's got it in memory, or something to that effect.

7 Q. Okay. So going back to that first meeting that you and  
8 Ms. Berning, Lieutenant Broach had, can you remember anything  
9 else that was discussed?

10 A. He talked about Lieutenant Campbell wanting him to work on  
11 a firefighter when he first arrived at Engine 34. And Lisa  
12 questioned him on, "What do you mean by working on this  
13 firefighter?"

14 And he said, "Well, she wanted" -- "He wanted me to write  
15 him up. He was late." Or if he was -- if he did anything, he  
16 wanted paperwork on it. And Lisa didn't understand that,  
17 because she thought that's -- that's your job, that's for a  
18 supervisor to write up an employee that's late or employee  
19 that -- that has a discipline problem of some type.

20 And he thought that -- Captain Campbell wanted to go out  
21 of his way to write him up for -- we -- me and Lisa didn't  
22 understand what he was talking about. Lieutenant Broach said  
23 that the firefighter evidence was for an inferior firefighter,  
24 meaning he wasn't a good firefighter.

25 Lisa suggested that he -- that Lieutenant Broach work hard

1 with him, train him, get him up to par, and Lieutenant Broach  
2 didn't feel like that was his job; that should have been done  
3 before he got there. And Lisa -- I mean, she went back and  
4 forth and saying, "Well, it's your job now; what you get paid  
5 to do. You need to do that. But if you have to go the extra  
6 mile to make sure the firefighter is ready for firefighter  
7 duties, that's what you need to do."

8 Basically, the first meeting, we were kind of waiting on  
9 the stack of evidence that he said he would present.

10 Q. Did Lieutenant Broach ever tell Lisa Berning at that first  
11 meeting that Captain Campbell had retaliated or was  
12 retaliating against Ron Evans because Ron Evans had filed a  
13 discrimination complaint some years earlier against Captain  
14 Campbell?

15 A. Well, I think the discussion was that when Lieutenant  
16 Broach first arrived, he set Lieutenant Broach down and told  
17 him every lieutenant that Firefighter Evans had worked under  
18 has been written up by Firefighter Evans. He's had problems  
19 with every lieutenant. So he kind of gave him a heads-up  
20 that, Hey, you've got one guy that's had problems with every  
21 lieutenant he's worked with and, you know, you'd better be on  
22 your game, so to speak.

23 Q. Was there any part of the conversation or discussion at  
24 that first meeting that led you to believe or have any  
25 concerns whatsoever that Lieutenant Broach had been

1 discriminated against?

2 A. No. No.

3 Q. And was there anything that took place in that -- where  
4 that was discussed in that first meeting that gave you any  
5 indication or concern that Lieutenant Broach had been  
6 retaliated against?

7 A. No.

8 Q. Okay.

9 A. Not that he presented.

10 Q. Okay. So you said there were four meetings. When was and  
11 what happened at the second meeting?

12 A. At the second meeting, that was myself, Captain Campbell,  
13 and Lisa.

14 Q. And let me stop you. I phrased my question poorly.

15 Do you remember when that second meeting was -- took  
16 place?

17 A. It was shortly after the first meeting. Within a week.

18 Q. And again, who was present?

19 A. Myself, Captain Campbell, Lisa Berning.

20 Q. What was discussed?

21 A. We discussed him working on Lieutenant Broach. And he  
22 explained that he set him down when he first came in and  
23 explained that Ron Evans had been a -- had written up every  
24 lieutenant that he worked under, so he needed to be sharp.

25 She did ask him directly if you ordered him to work on Ron

1 Evans. And he stated that he just told -- he kind of warned  
2 him about him when he first came in. That was his reply.

3 Q. Did you have any doubts about Captain Campbell's veracity  
4 at that second meeting you attended?

5 A. No.

6 Q. Did you have any doubts about Lieutenant Broach's veracity  
7 at that first meeting you had with him?

8 A. Yes.

9 Q. And why did you doubt his truthfulness?

10 A. Well, he kept stating that he had a stack of evidence and  
11 this was his time to present his EEO complaint. He wanted --  
12 you know, it's his complaint. "This is your complaint. Give  
13 us what's going on here."

14 Q. Did you know that that first meeting was recorded?

15 A. No, we didn't.

16 Q. I'm sorry. You did not?

17 A. No, I didn't.

18 Q. So there was a third and fourth meeting with the EEO, is  
19 that correct?

20 A. Yes.

21 Q. Do you remember what the purpose of those two meetings  
22 were?

23 A. To try to come up with a solution, working solution, for  
24 Lieutenant Broach and Captain Campbell.

25 Q. And who -- who all attended that meeting?

1 A. Myself, Lieutenant Broach, Captain Campbell, and Lisa  
2 Berning.

3 Q. And what was -- was there --

4 Could you describe the difference between what happened at  
5 the --

6 First of all -- let me stop. Do you remember when those,  
7 the third and fourth meetings, took place?

8 A. They were shortly after -- within a week of the second  
9 meeting.

10 Q. And how close in time were the third meeting and the  
11 fourth meeting?

12 A. Maybe three days. Maybe three days.

13 Q. Okay. And was there -- what was discussed at the third  
14 meeting?

15 A. The third meeting was pretty heated between Captain  
16 Campbell and Lieutenant Broach. In that third meeting,  
17 Lieutenant Broach talked about a couple incidents that were  
18 really a concern for everyone in the room. He talked about an  
19 incident where he made an extra-long fire on McMicken Avenue,  
20 and when he pulled up to the scene, one of his firefighters  
21 jumped off the apparatus and ran the opposite direction.  
22 That's unheard of in the Fire Department. I've never heard of  
23 it. But Lieutenant Broach failed to report this to the  
24 Incident Commander, and that is probably the worst thing you  
25 can do as far as at a fire: Not knowing where your men are.

1 One man -- one of his guys ran off. To me, that jeopardizes  
2 the fire company itself, jeopardizes the citizens, the  
3 property, and the other firefighters that are fighting the  
4 fire in the building. And for him not to report is -- is the  
5 worst thing a lieutenant can do, because now you don't know  
6 the condition of your firefighter who ran off. You didn't  
7 report this to your Incident Commander. That should have been  
8 reported immediately, a mayday should have been put out, and  
9 that didn't happen. And he never reported the incident at  
10 all.

11 Q. Did he give an explanation of why he didn't report it?

12 A. He just said "Ron," as being Ron, "Ron is" -- "Ron is  
13 scared of fire." That's his -- that's his company. He has to  
14 report that.

15 Q. Just to be clear, who was the firefighter?

16 A. Ron Evans.

17 Q. Do you know which fire that -- that happened at?

18 A. It's the McMicken fire, three-alarm fire. Costume store.

19 Q. Were you at that fire?

20 A. Yes, I was. I was working at Ladder 29.

21 Q. So this was before you were in Internal Investigations?

22 A. Yes.

23 Q. And what do you remember about that fire?

24 A. It was a big fire. I mean, it was a big fire. It was on  
25 the inside. We all ended up having to exit the fire because

1 the building was engulfed, and we ended up on the exterior of  
2 that.

3 Q. And did you see, witness, Evans running?

4 A. I didn't pay any attention. I was focused on my men and  
5 getting my men in and out safely.

6 Q. Well, who raised the issue of Evans running at the fire?

7 A. Lieutenant Broach. That was the first I've ever heard of  
8 it.

9 Q. Okay. And you talked about the building burning down and  
10 being dangerous, right?

11 A. Correct.

12 Q. Wouldn't any firefighter need or want to run from a fire  
13 in that situation?

14 A. Not in the beginning. All the fire companies were inside  
15 the building. At one point in time the fire overcame the  
16 building and it ended up burning down. But that's our job.  
17 That's what we do every day. We don't run from fires, or all  
18 the buildings would burn down in the city.

19 Q. When the -- Ron Evans running from a fire incident was  
20 discussed at those -- at one of the October meetings, was it  
21 discussed in a joking way at all?

22 A. Yes.

23 Q. And how so?

24 A. He just -- I guess he was trying to say what type of  
25 firefighter Ron was, and that the incident came up.



1 Q. Did you think it was a joke?

2 A. No, I didn't.

3 Q. Do you think anybody else at the meeting thought it was a  
4 joke?

5 A. I don't think anyone thought it was a joke.

6 Q. So, you indicated that Lieutenant Broach mentioned a  
7 number of disciplinary incidents at those October meetings?

8 A. Yes.

9 Q. So what else -- what other incidents did he raise?

10 A. Another incident that bothered me was the apparatus was  
11 damaged one tour that he was on. His driver reported it to  
12 him and he failed to report it to his superior or the unit --  
13 the oncoming unit. And that -- that's also a serious incident  
14 to me, because any time you have structural damage to a fire  
15 apparatus, you jeopardize the lives of citizens and the fire  
16 company, the firefighters that are working after you.

17 And if you make a run and the bumper falls off, which  
18 there was damage to the bumper, and you don't report this  
19 incident, then you kind of sabotage the next unit.

20 Q. And just to be clear, who was raising these discipline  
21 incidents at the October meetings?

22 A. Lieutenant Broach.

23 Q. Was it your intention to rehash past discipline?

24 A. No, we were just trying to get to the basis of his  
25 complaint.

1 Q. And did you have an opinion as to whether the discipline  
2 items that were mentioned in the meeting were -- that there  
3 was just cause for them?

4 A. Repeat your question.

5 Q. Do you have an opinion as to the disciplinary items that  
6 were raised by Lieutenant Broach? Did you think that they had  
7 merit to them? Let me stop and ask you again in a different  
8 way.

9 Based on what you heard, did you think that there had been  
10 a basis for those past disciplinary --

11 A. Yes.

12 Q. -- actions?

13 A. Yes. They were all heard, they were all disciplined for,  
14 every last one of the disciplines he brought up. He even took  
15 a few of them to the Peer Review Board, which is a board made  
16 up of members of his own peers, and they sided with the  
17 charges.

18 Q. And --

19 A. Excuse me. I'm sorry. And those members, most the time  
20 there were two African-Americans and one Caucasian on that  
21 board.

22 Q. Have you ever served on the Peer Review Board?

23 A. No, I have not.

24 Q. Have you ever been before the Peer Review Board?

25 A. No, I have not.

1 Q. Do you have any knowledge as to whether the Peer Review  
2 Board ever reverses charges?

3 A. Yes, they do. Probably 70 percent of the time.

4 Q. I'm sorry. What percentage?

5 A. Seventy percent of the time.

6 Q. Okay. Will reverse the charge?

7 A. Reverse the charge.

8 Q. Okay.

9 A. Or lessen the discipline.

10 Q. So, based on the peer -- the peer review process and what  
11 was discussed in the meeting, you didn't get any sense or  
12 indication that the past discipline against Lieutenant Broach  
13 was improper?

14 A. No. Not at all.

15 Q. Do you remember any discussion at the October meetings  
16 about Lieutenant Broach accusing Captain Campbell of being  
17 disloyal?

18 A. No, I don't. I can't recall.

19 Q. And do you recall any discussion at those October meetings  
20 about Lieutenant Broach making an anonymous call to report  
21 suspected intoxication?

22 A. I remember discussion over it. I think he denied it at  
23 the meeting.

24 Q. He denied what?

25 A. Making the call.

1 Q. And is it a problem for any firefighter to make an  
2 anonymous call to report suspected alcohol intoxication?

3 A. That's not the procedure. The procedure is that you would  
4 notify your supervisor and he would get a witness and both  
5 parties would observe whoever the suspect is.

6 Q. Is there a difference in duty on --

7 (Court reporter requested counsel to repeat.)

8 Q. Is there a difference in the obligations of a regular  
9 firefighter compared to an officer in terms of their  
10 obligations to report suspected alcohol abuse or intoxication?

11 A. He has more responsibility. And that was one of the  
12 problems with Lieutenant Broach: All the incidents here, he  
13 never wanted -- he didn't want to take responsibility for  
14 anything he's done in his past. Even the firefighter running  
15 away from the fire, he didn't want to take responsibility for  
16 that. He didn't want to take responsibility for the incident  
17 with the apparatus in the firehouse. He thought that was  
18 totally on the driver, even though the driver reported it to  
19 him. And that was sort of -- that was the reasoning for him  
20 -- I guess Lisa deciding that he needed to be evaluated,  
21 because he just wouldn't take responsibility for any of the  
22 incidents that happened to him throughout his career. He just  
23 -- it was always somebody else's fault, always the  
24 firefighter's fault.

25 Even at the -- the fire incident on the one that I did a

1 summary over, he wanted the firefighters to be responsible.  
2 He wanted to write them up.

3 Even though it's his company, he didn't understand the  
4 instructions. You're the lieutenant. What happens under your  
5 company is your responsibility. He doesn't understand that.  
6 And we needed to --

7 I think Lisa wanted to have him evaluated because he  
8 didn't understand the responsibilities of being a supervisor.  
9 You're the supervisor. This is your apparatus. This is your  
10 firehouse. These are your men. You're responsible for  
11 training these men. You're responsible for them going to a  
12 fire and executing extinguishment, executing an emergency run,  
13 emergency situation. You're responsible for your guys'  
14 actions at the scene. He never understood any of that.

15 Q. And what is the concern, sir, that a lieutenant doesn't  
16 understand accepting responsibility for his team?

17 A. His firefighters will leave without him because he's not a  
18 good supervisor. So -- and that's what happened in his case.  
19 I mean, I've never had a firefighter run. I've never seen  
20 that happen throughout my career. I've been a firefighter for  
21 27 years; I've never seen a firefighter run away from a scene  
22 at a fire. I've never seen firefighters leaving me on the  
23 apparatus to go extinguish a fire. I've never seen that  
24 happen, and it would only happen if you don't have command of  
25 your team, if you're not a good lieutenant.

1 Q. What kinds of safety concerns does inability or refusal to  
2 supervise cause?

3 A. Lives.

4 Q. Can you explain that?

5 A. Well, if you don't operate as a company, then you'll never  
6 -- and your men expressly --

7 One of the men on the nozzle of the fire, the hose on the  
8 Ludlow fire, he was -- I think he was a one- or two-year  
9 firefighter. And for him to run in and not have knowledge of  
10 a leader like Broach -- you know, he's a 20-year guy, that --  
11 that's dangerous. Very dangerous.

12 Q. Was there any discussion at either one of the October  
13 meetings about whether Captain Campbell was a racist?

14 A. Yes.

15 Q. There was?

16 A. Yes.

17 Q. And what do you remember about --

18 What was that discussion?

19 A. I think Broach brought up institutionalized racism. And I  
20 don't know where it came from, but he looked at me, like,  
21 Yeah, you know what I'm talking about.

22 I said, "I don't know what you're talking about. Can you  
23 explain what you're talking about?" I think Lisa made a  
24 comment that it's okay for people to have racist feelings as  
25 long as they don't act on them, and I think Broach took that

1 as she's being racist now.

2 And, I mean, people are gonna have their own thoughts.  
3 Basically what she was trying to say is people are going to  
4 have their own thoughts. As long as they don't act on them,  
5 then they don't cross that line.

6 Q. Assuming for the sake of argument that Captain Campbell  
7 was a racist, did you witness any of that in your work  
8 relationship with him?

9 A. No. As a matter of fact, I think Lieutenant Broach and  
10 Ron Evans tried to start a petition to remove Captain Campbell  
11 from Engine 34, and in doing so they -- they -- I guess they  
12 talked to some guys. The other guys at the firehouse was  
13 probably 14 -- there's probably 12 to 14 African-American  
14 firefighters that work in that house, and all of them refused.

15 MR. GERHARDSTEIN: Objection, Your Honor. Sidebar?

16 SIDEBAR CONFERENCE:

17 MR. GERHARDSTEIN: Objection's based on no foundation  
18 for this hearsay testimony about the conduct of 14 other  
19 officers. And we're drifting way off of everything that's  
20 documented in the transcripts of the EEO hearing or anything  
21 that I've ever heard from this witness before. So, I just  
22 want to know that there is a foundation somewhere.

23 MS. POWELL: This is based on -- based on things that  
24 Lieutenant Evans has heard from other people. There was a lot  
25 of testimony from Lieutenant Broach hearing things -- bad

1 things about Captain Campbell. It was much as Lieutenant  
2 Broach's testimony: Rumors. It's the same thing. There is  
3 no reason he shouldn't be able to testify to this.

4 MR. GERHARDSTEIN: Oh, Judge -- all right.

5 THE COURT: The petition he's talking about, is it  
6 regarding the email --

7 MS. POWELL: No.

8 MR. GERHARDSTEIN: If they think that there was  
9 hearsay during Broach's testimony, they should have objected.  
10 They didn't. So, to just have this person start testifying as  
11 if he's testifying from personal knowledge, which is exactly  
12 what he was doing, I'm going to ask that the testimony be  
13 stricken and this jury be instructed not to regard any of that  
14 testimony.

15 THE COURT: Okay.

16 MS. POWELL: Can I ask him whether it was based on  
17 personal knowledge or rumor?

18 MR. GERHARDSTEIN: We're not here to hear rumor.

19 MS. POWELL: But you guys opened the door to rumor.

20 MR. GERHARDSTEIN: Take each piece at a time.

21 MS. POWELL: I think that --

22 MR. GERHARDSTEIN: But you should be objecting then;  
23 not like piling on now.

24 MS. POWELL: I'm just saying Lieutenant Broach's  
25 testimony was laden with comments about what rumors were



1 going around and what the rumors were, and he opened the door  
2 as to a discussion of rumor.

3 MS. BRANCH: No, he didn't.

4 MR. GERHARDSTEIN: There is no evidence rule that  
5 says when somebody for various reasons talks about rumor or  
6 reputation that the trial turns into a bunch of clothesline  
7 yakking, which is what we're getting to.

8 THE COURT: Okay. I'm going to strike his response;  
9 order the jury to disregard it.

10 You can ask him if he has personal knowledge about any  
11 attempts to have Captain Campbell removed. If he does, we can  
12 see where it goes.

13 MS. POWELL: Okay.

14 CONCLUSION OF SIDEBAR CONFERENCE

15 THE COURT: The witness' response to the question is  
16 going to be stricken from the record and the jury is  
17 instructed to disregard his response.

18 BY MS. POWELL:

19 Q. Lieutenant Lemons, do you have any personal knowledge as  
20 to whether there were any efforts to have Captain Campbell  
21 removed from the 34's?

22 A. No, I don't. Just the --

23 THE COURT: That's okay.

24 Q. That's okay.

25 Did Lieutenant Broach ever object to your presence at any

1 of the EEO meetings?

2 A. No, he did not. And if he did, I would have left.

3 Q. And do you remember whether you ever offered to leave any  
4 of the meetings?

5 A. Yes, I did.

6 Q. Now, did you play any part in the recommendation for  
7 Lieutenant Broach to be referred for a fitness-for-duty  
8 evaluation?

9 A. No, I did not.

10 Q. And were you present at the 34's on October the 19th when  
11 Lieutenant Broach was relieved from duty pending -- pending  
12 his fitness-for-duty evaluation?

13 A. Yes, I was.

14 Q. Who were you there with?

15 A. Myself, Assistant Chief Demasi, Assistant Chief Kuhn,  
16 Chief Texter. That's it.

17 Q. And what was the reason for your being there?

18 A. To explain to Lieutenant Broach that the -- the reason for  
19 some of the statements he made at the meetings.

20 Q. And just to make sure I understand completely what you're  
21 saying, you were there to explain --

22 Could you say again what you were there for?

23 A. I was there to explain to Lieutenant Broach that because  
24 of his not taking responsibility for his company, a lot of the  
25 statements he made during the meetings with Lisa, myself,

1 Captain Campbell, that they wanted to have him evaluated.

2 Q. Did you know that the --

3 Did you know whether or not any of the October -- any of  
4 the third or fourth meetings that you had with Lieutenant  
5 Broach were recorded?

6 A. No, I did not.

7 Q. Did you find out at some point that they were?

8 A. Yes, I did.

9 Q. And did you ever have an opportunity to listen to those  
10 recordings?

11 A. Yes, I did, at a later date, after Lieutenant Broach -- I  
12 guess through his attorney.

13 Q. Were you given any transcripts of those recordings?

14 A. Yes, I was.

15 Q. Okay. I'm gonna have you start -- open your exhibit book  
16 to Joint Exhibit V.

17 Have you seen this document before?

18 A. Yes, ma'am.

19 Q. Okay. And what is it?

20 A. Our sick leave policy.

21 Q. Are you on the Joint Exhibit notebook? There's three  
22 notebooks.

23 A. Okay.

24 Q. Okay. Have you seen --

25 You're looking at Joint Exhibit V?

1 A. Yes, I am.

2 Q. Okay. And have you seen this document before?

3 A. Yes, ma'am.

4 Q. And what is it?

5 A. It's the transcripts of -- transcript of Lieutenant  
6 Broach's secret tapes.

7 Q. And have you read through this?

8 A. Yes, I have.

9 Q. You said you also listened to those tapes?

10 A. Yes, ma'am.

11 Q. Okay. And this JX V, what -- for what meeting does the  
12 transcript reflect?

13 A. Either the third or fourth meeting.

14 Q. And that was the one on October the 6th?

15 A. Yes, ma'am.

16 Q. And when you went --

17 When you had the opportunity to listen to the recording of  
18 the October 6th meeting and to read the transcript, were both  
19 accurate representations of what had taken place at that  
20 meeting?

21 A. Pretty much, yes.

22 Q. I'm gonna have you turn to Joint Exhibit VI. Have you  
23 seen this document before?

24 A. Yes, ma'am.

25 Q. And what is it?

1 A. It's a transcript of the taped meeting by Lieutenant  
2 Broach.

3 Q. For which meeting?

4 A. The last meeting.

5 Q. And that would be dated October the 13th, 2010?

6 A. Yes, ma'am.

7 Q. Have you read this transcript?

8 A. Yes, ma'am.

9 Q. And did you also listen to the tape that -- that would  
10 accompany this transcript?

11 A. Yes, ma'am.

12 Q. And were both the transcript and the tape or the recording  
13 that you listened to, did they accurately represent the  
14 conversation that took place during that meeting?

15 A. Pretty much.

16 Q. Do you remember whether performance evaluations were  
17 discussed at any of the EEO meetings?

18 A. Yes, they were.

19 Q. Who brought -- who brought up the topic of performance  
20 evaluations?

21 A. Lieutenant Broach.

22 Q. Do you remember what was discussed?

23 A. I can't recall word for word. In general, he had some  
24 complaints about his -- his marks.

25 Q. About -- I'm sorry. His marks?

1 A. His review.

2 MS. POWELL: Your Honor, one minute to confer with  
3 counsel?

4 THE COURT: Sure.

5 (Defense Counsel confer privately.)

6 MS. POWELL: Thank you, Lieutenant Broach. I have no  
7 further questions.

8 MR. GERHARDSTEIN: Lieutenant Lemons.

9 MS. POWELL: So sorry. Lieutenant Lemons.

10 MR. GERHARDSTEIN: Thank you, Judge.

11 CROSS-EXAMINATION

12 BY MR. GERHARDSTEIN:

13 Q. Lieutenant Lemons --

14 A. Yes, sir.

15 Q. -- you were not involved in the decision to refer  
16 Lieutenant Broach for a fitness for duty, right?

17 A. That's correct.

18 Q. And, yet, you're here today to tell us what bothered you  
19 about what Lieutenant Broach said on the meeting of  
20 October 6th and the meeting of October 13th, right?

21 A. As a firefighter, yes.

22 Q. Okay. And, in fact, when you were asked whether you could  
23 identify what Mark Broach did or said at those EEO sessions  
24 that supported a fitness for duty and a removal from duty, you  
25 said that would be speculation, right?

1 A. No, I did not.

2 Q. All right. Take a look at your deposition.

3 THE COURT: We will get it to you.

4 Q. Ms. Branch took your deposition on January 13th -- 15th,  
5 2013, right?

6 A. Which page are we looking at?

7 Q. She took your deposition on January 13th -- 15th, 2013,  
8 right?

9 A. That's correct.

10 Q. And you were under oath at that time, right?

11 A. Yes, I was.

12 Q. Turn to page 111, please.

13 A. I've got it.

14 Q. Look at line 25, the very last line:

15 "Question: Did anybody explain what he did or what  
16 he said during those meetings that thought he needed to be  
17 evaluated?"

18 "Answer: I couldn't -- it would all be speculation.  
19 I couldn't tell you."

20 Did I read that correctly?

21 A. Did --

22 Q. Did I read that correctly?

23 A. Yes, you did.

24 Q. Okay. So you were not consulted by Lisa Berning, right?

25 A. No, I wasn't.

1 Q. And she wrote up her referral for a fitness for duty  
2 without your input, according to the record to this date,  
3 right?

4 A. That's correct.

5 Q. And you didn't see her draft before you went to the 34's  
6 to be part of the team that told Lieutenant Broach that he was  
7 to be removed from duty, right?

8 A. That's correct.

9 Q. So, you didn't really know anything about what he had said  
10 or done that made Lisa Berning make a referral for a fitness  
11 for duty, right, as of October 19th?

12 A. I was included in the meetings.

13 Q. That's correct. But you thought --

14 A. I sat through all the meetings.

15 Q. Hold on. Hold on. One at a time.

16 You were included in the meetings --

17 A. Yes.

18 Q. -- but between the end of the meeting on October 13th and  
19 your confronting Lieutenant Broach at the 34's on  
20 October 19th, you hadn't even seen a draft of any referral,  
21 right?

22 A. That's correct.

23 Q. And you didn't know anything about the referral, right?

24 A. I knew of a referral, yes.

25 Q. By the time you were going out to the 34's?



1 A. That's correct.

2 Q. Okay. But you didn't know about it while it was being  
3 drafted, right?

4 A. Not while it was being drafted.

5 Q. And you didn't know that she had turned to Captain  
6 Campbell, the man who had been accused of discrimination, and  
7 said, "Why don't you take a look at this and give me any ideas  
8 or drafting ideas," right? You didn't know that, right?

9 A. I can't recall.

10 Q. That would be pretty unusual, wouldn't it?

11 A. I can't recall.

12 Q. You sat through the whole meeting on October 6th and  
13 October 13th, right?

14 A. That's correct.

15 Q. And you did a prior meeting, as you testified to  
16 initially, with Lieutenant Broach and Lisa Berning, right?

17 A. That is correct.

18 Q. And at the end of the meeting on October 13th, you saw  
19 Lieutenant Broach sign an agreement that was handwritten by  
20 Lisa Berning, right?

21 A. That's correct.

22 Q. And you saw Captain Campbell sign an agreement that was  
23 handwritten by Lisa Berning, right?

24 A. That is correct.

25 Q. And you assumed they were going to implement this

1 agreement, go back to work, and talk to each other about  
2 discipline and try to work it out, right?

3 A. Lieutenant Broach --

4 Q. First answer the question, then you can explain.

5 You assumed that they were going to work it out by  
6 implementing this agreement, right?

7 A. No, I didn't.

8 Q. Okay. So, you thought the agreement was a sham?

9 A. I didn't think Lieutenant Broach meant what he was doing.

10 Q. Did you tell him that?

11 A. He knew that.

12 Q. You're in his head now?

13 A. I was there to give -- help Lisa with the terminology. I  
14 wasn't there to explain anything to Lieutenant Broach. Lisa  
15 Berning handled the whole meeting.

16 Q. Okay. But now you're here to tell the jury that somehow,  
17 even though you thought it was speculation to figure out a  
18 basis for fitness for duty, that today, now that he's filed a  
19 lawsuit, you have all these reasons --

20 MS. POWELL: Objection.

21 Q. -- that would support a fitness-for-duty referral, right?

22 A. Lieutenant Broach --

23 THE COURT: Hold on one second. Please don't --

24 MR. GERHARDSTEIN: Hold on. There's an objection.

25 THE COURT: Objection?

1 MS. POWELL: Yes.

2 THE COURT: Sidebar, please.

3 SIDEBAR CONFERENCE:

4 (The Court requested the prior question to be read back,  
5 as follows:

6 "Q. Okay. But now you're here to tell the jury that  
7 somehow, even though you thought it was speculation to  
8 figure out a basis for fitness for duty, that today, now  
9 that he's filed a lawsuit, you have all these reasons --

10 "MS. POWELL: Objection.

11 "Q. -- that would support a fitness-for-duty  
12 referral, right?")

13 MS. POWELL: So the reason for the objection is that  
14 it was a mischaracterization of --

15 The way that the question was characterized was Lieutenant  
16 Broach --

17 (Defense Counsel confer privately.)

18 MR. GIGLIO: If I may, Your Honor?

19 THE COURT: Sure.

20 MR. GIGLIO: The question that was quoted by  
21 Mr. Gerhardstein is did anyone explain what he did or what he  
22 said. He said that was speculation.

23 It was a mischaracterization to say that he speculated it.

24 Did anyone explain it to him? He said that was  
25 speculation. It's a mischaracterization of his testimony in

1 the deposition.

2 MR. GERHARDSTEIN: Judge, that's redirect material.

3 That's not -- it's not a fair basis for an objection.

4 THE COURT: Okay. You can address it on redirect.

5 MS. POWELL: Okay.

6 THE COURT: Thank you.

7 CONCLUSION OF SIDEBAR CONFERENCE.

8 THE COURT: Whenever you're ready.

9 MR. GERHARDSTEIN: Mary Ann, could you read back the  
10 last question?

11 (Court reporter read back the pending question as follows:

12 "Q. Okay. But now you're here to tell the jury that  
13 somehow, even though you thought it was speculation to  
14 figure out a basis for fitness for duty, that today, now  
15 that he's filed a lawsuit, you have all these reasons --

16 "MS. POWELL: Objection.

17 "Q. -- that would support a fitness-for-duty  
18 referral, right?")

19 BY MR. GERHARDSTEIN:

20 Q. You can answer.

21 A. Lieutenant Broach entered the meetings with EEO. He  
22 brought up the incident where the firefighter ran away from  
23 the fire. He brought up the incident of him not reporting the  
24 apparatus being damaged. Those were incidents he brought up.  
25 I never brought them up. He brought them up.

1 Q. Lieutenant, you said you were there to help Lisa Berning  
2 with terminology and to help her understand the Fire  
3 Department, right?

4 A. Yes, sir.

5 Q. You said that you were not there to bring charges or  
6 enforce in your role as an investigator --

7 A. I did not.

8 Q. -- is that correct?

9 A. I did not.

10 Q. Am I right that you were not there to do that?

11 A. That is correct.

12 Q. Okay. Did you tell Lieutenant Broach that you were not  
13 there to do any investigation of the matters he brought up?

14 A. Yes, I did. I told him --

15 Q. Okay.

16 A. -- I would leave the room if he was uncomfortable with me  
17 being there.

18 Q. Okay. Well, I understand that, but did you tell him you  
19 were not there to investigate any matters that he brought up?

20 A. No, I didn't --

21 Q. Okay.

22 A. -- tell him that.

23 Q. So you were pretty shocked when you thought he said that  
24 at the costume fire Firefighter Evans jumped off the equipment  
25 and ran away from the fire; that was pretty shocking, right?

1 A. As a firefighter, yes.

2 Q. Okay. And that's what you thought --

3 A. That's not what I thought. That's what I said.

4 Q. -- Broach's explanation of that event was, right?

5 A. That is not what I thought. That's what he said.

6 Q. And at that point did you tell him that his explanation is  
7 so shocking that you are now going to have to consider that as  
8 you -- in your role as a member of Internal Affairs?

9 A. No, I did not.

10 Q. Okay. But, you now cite that report as one of the things  
11 that in your mind should be considered on a fitness-for-duty  
12 referral, right?

13 A. Not just that incident.

14 Q. Okay. But that's one of them, right?

15 A. Throughout the meeting there was several incidents.

16 Q. Okay. That's one of them, right?

17 A. That is correct.

18 Q. And Lieutenant Broach says that at the fire there was a  
19 mayday, people did exit the interior, and Ron Evans did run in  
20 further than anyone else. Is that news to you?

21 A. He never mentioned that. Mayday was for everybody to get  
22 out of the building.

23 Q. Okay.

24 A. There is a difference from running off an apparatus and a  
25 mayday leaving the building that is structurally damaged where

1 everyone has to exit the building.

2 Q. Right.

3 A. And I did ask him at that meeting "Did you report that to  
4 your -- your superior?"

5 Q. Right. So -- so this is a really important thing, right?

6 A. Yes, it is.

7 Q. Okay. So it would be good if there was a thorough  
8 investigation of the costume fire, right?

9 A. Well, that was before my time in Internal.

10 Q. Right. It was actually from 2008, right?

11 A. Correct.

12 Q. And the incident involving the truck damage was from 2009,  
13 right?

14 A. Correct.

15 Q. And the costume fire, if you wanted to get to the bottom  
16 of what really happened in a reliable way, you would  
17 investigate it the way you investigated the Potter charges,  
18 right? You talked to the last responding fire company first  
19 and then you talked to the first responding fire company last,  
20 and you'd look at all the run sheets and you'd look at all the  
21 information to make sure that you had an accurate picture of  
22 what really happened, right?

23 A. The problem is Lieutenant --

24 Q. Well, first answer my question, sir.

25 If you wanted to know what happened, you'd do a thorough

1 investigation, right?

2 A. It's hard to do a thorough investigation with five --

3 Q. Hold on. Answer the question first and then you can  
4 explain.

5 A. I'm trying to answer your question, sir.

6 Q. Okay. If you wanted to know what happened, you would do a  
7 thorough investigation, isn't that right, sir? Yes or no.

8 A. If I had knowledge that --

9 Q. Hold on. Hold on. We have to get along here. All right?

10 A. I'm trying to get along.

11 Yes, you would have to do a thorough investigation.

12 Q. Okay. And a thorough investigation, as we've seen because  
13 you do those --

14 A. Right.

15 Q. -- includes getting all the documents, right?

16 A. Right.

17 Q. And interviewing the firefighters at the scene, right?

18 A. That's correct.

19 Q. And when you were in those sessions with Lisa Berning, did  
20 you think you were investigating his charges of  
21 discrimination?

22 A. We thought we were, yes.

23 Q. Okay. And if you thought you were investigating his  
24 charges of discrimination, at any point did Lisa Berning ask  
25 the Fire Department for any pattern information, like what is



1 the record of fires/discipline against black officers versus  
2 white officers? Did she ask for that?

3 A. I can't recall.

4 Q. If your -- Internal is part of Human -- Fire Human  
5 Resources, right?

6 A. Correct.

7 Q. So, if she had asked to look at the big picture of  
8 fire/discipline by race, you could have answered that  
9 question, right?

10 A. If I had done research, yes, I could.

11 Q. Yeah. You had that information available to you in the  
12 Human Resources Department at the Fire Department, right?

13 A. We could put the data together to get that information.

14 Q. In fact, every year you put data like that together for  
15 the annual Affirmative Action Report for the city, right?

16 A. Correct.

17 (Messrs. Gerhardstein and Giglio confer privately.)

18 MR. GERHARDSTEIN: We're up to 38?

19 THE COURT: 39, I believe.

20 MR. GERHARDSTEIN: 39?

21 MR. GIGLIO: May we approach?

22 THE COURT: You may.

23 SIDEBAR CONFERENCE:

24 THE COURT: Okay.

25 MR. GERHARDSTEIN: This is discipline by race. First

1 we have --

2 These are the full reports, if they want to check it. But  
3 for 2009, this is 2010, we have Protective Services Sworn,  
4 23.8 percent of the Protected Services, black males.

5 THE COURT: We went through this report.

6 MR. GERHARDSTEIN: With Berning.

7 THE COURT: Okay.

8 MR. GERHARDSTEIN: Actually, I went through other  
9 years, but since then I've been able to get '9, '10 and '11.

10 MS. POWELL: Okay.

11 MR. GERHARDSTEIN: And in this year they reported  
12 fires separately. And, so, 53 percent of the discipline is  
13 against black males in the Fire Department. But black males  
14 only make up 23 percent of the Protected Service Sworn.

15 THE COURT: Okay. And the objection?

16 MS. POWELL: I guess it's not clear to me what it's  
17 going to be used for. If it's going to be used for  
18 impeachment purposes, he hasn't denied --

19 MR. GERHARDSTEIN: No, I just laid a foundation that  
20 said he could have gotten the information. I did. And I want  
21 to show that had he gotten it, it's relevant to the issue  
22 whether all those disciplines Lieutenant Broach was  
23 complaining about were fair.

24 MS. POWELL: He's not the --

25 There's no indication he's the one doing the

1 investigation. These are documents we haven't seen. This  
2 isn't a disparate impact case. This is a --

3 MR. GERHARDSTEIN: Actually, every individual case  
4 starts with this. You know, what is the pattern of discipline  
5 by the employer against the person in the protected class?

6 He just agreed he could have answered a question like  
7 that. Lisa agreed she could have asked for it, and the City  
8 reports it everybody year.

9 THE COURT: We talked about the reports before, so he  
10 can ask the question and you can develop on redirect.

11 MS. POWELL: Okay.

12 MR. GIGLIO: Just note our objection. This is  
13 improper. It's not a disparate impact case. The exhibits  
14 were never provided and it should not be admitted. Thank you.

15 MS. POWELL: Thanks.

16 THE COURT: Thank you.

17 CONCLUSION OF SIDEBAR CONFERENCE

18 MR. GERHARDSTEIN: May I approach just to leave them  
19 with the witness?

20 THE COURT: Yes.

21 MR. GERHARDSTEIN: I've made a set for you, Judge.

22 THE COURT: Thank you.

23 MR. GERHARDSTEIN: So 2009 is 39; 2010 is 40; and  
24 2011 is 41.

25 THE COURT: Thank you.

1 MR. GERHARDSTEIN: Thank you.

2 BY MR. GERHARDSTEIN:

3 Q. So, you agreed that if Lisa Berning had asked you about  
4 the discipline of white versus black in the Fire Department,  
5 you could have answered that question, right? Or you could  
6 have provided data that relates to that question, right?

7 A. Probably.

8 Q. So take a look at Exhibit 39. These are two pages from  
9 the City's affirmative action program from 2009. And the one  
10 page that was excerpted is page 19 and it's called Utilization  
11 Analysis. Do you see that?

12 A. Yes.

13 Q. Now, they don't break out Fire separately, but they have  
14 Protected Service Sworn, which we learned from earlier  
15 testimony means Fire and Police. Do you agree with that?

16 A. Yes.

17 Q. And this document indicates that of all the employees in  
18 the Protected Service Sworn category, 24.4 percent are black  
19 males, right?

20 A. That's correct.

21 Q. Is that about -- based on your what, 27 years --

22 A. Yes.

23 Q. -- in the Fire Department, is that about right for Fire,  
24 or is it slightly more or less if you tried to tease out Fire?

25 A. I can't speak to that.

1 Q. Okay.

2 A. I'm an internal investigation lieutenant. I take my cases  
3 on a case-by-case basis. I couldn't tell you how many blacks  
4 or whites that I disciplined. I don't look at the numbers. I  
5 look at the case.

6 Q. Uh-huh.

7 A. I'm a black officer myself and I want to treat everyone  
8 fair and equal. I couldn't tell you -- I couldn't give you  
9 the breakdown of this year how many blacks or whites I  
10 interviewed or looked into their cases. That doesn't matter  
11 to me.

12 Q. Well, that's very helpful to know. You're saying that you  
13 never look at whether there's more discipline against blacks  
14 than whites? You don't look at the numbers?

15 A. That's correct.

16 Q. Have you gone through EEO training?

17 A. Yes, I have.

18 Q. Have you been advised by the City in your EEO training  
19 that it is helpful to track a comparison between the group  
20 upon which discipline is visited to the number, the percentage  
21 of that group, in the labor force? Has that ever been  
22 suggested to you?

23 A. It's been suggested, but when you deal with lives of the  
24 public, everyday lives of firefighters every day, you look at  
25 incidents, and that's what I look at. I look at the safety of

1 the firefighters and the safety of the public.

2 Q. Right.

3 A. I don't have time to look at numbers and should I go here  
4 or there with my number. I don't work like that.

5 Q. So, are you saying that the City has advised you to at  
6 least track whether African-Americans or women are disciplined  
7 more than whites or males but you just don't do it? Is that  
8 what you're saying?

9 A. I'm not saying that.

10 Q. Okay.

11 A. I'm saying I look at each incident as it comes up and I  
12 investigate that incident that's before me.

13 Q. And you don't look at --

14 A. Race.

15 Q. -- the numbers, right?

16 A. I don't look at race.

17 Q. All right. But you don't look at the numbers either,  
18 right?

19 A. Maybe the number of cases I have, but not the numbers as  
20 far as -- as far as percentage of --

21 Q. Okay.

22 A. -- who's gotten in trouble over the last year. No, I  
23 don't.

24 Q. Okay. So, this has about 24 percent black males here in  
25 the Protected Sworn Service. Do you see that?

1 A. Yes, I do.

2 Q. All right. And for the year 2009 -- whoops -- Fire had 21  
3 incidents of discipline against black males, right?

4 A. If you say so.

5 Q. Well, according to the report that was filed?

6 A. Okay.

7 Q. It's part of the City's EEO report.

8 And that represented 45.7 percent of all the discipline in  
9 the Fire Department, right?

10 A. That's correct, but a lot of data is misleading because  
11 that's small violations also --

12 Q. All right.

13 A. -- and we can't control if a guy gets a DUI.

14 Q. Right. I understand that there could be an explanation.  
15 My question is, really do you even look at it?

16 A. No, I don't.

17 Q. Okay.

18 A. I haven't looked at it, no.

19 Q. And when Lieutenant Broach was raising questions about his  
20 prior discipline, he was suggesting that he was being  
21 disciplined for things that white firefighters weren't being  
22 disciplined for, it was unfair. Right?

23 A. I never heard that come up, no.

24 Q. And then in 2010, we have 24.1 percent again of the  
25 Protected Service as black males, right?

1 A. Correct.

2 Q. And, actually, we're not going to see much variation,  
3 because the City hasn't been doing much hiring, right?

4 A. Right.

5 Q. But in the discipline for 2010, it was -- 50 percent of  
6 the discipline was visited on that 24 percent of the  
7 Protective Service labor force, right? Is that correct?

8 A. That's correct.

9 Q. And then in 2011 -- and these Affirmative Action Reports  
10 come at the end of the year, right?

11 A. Correct.

12 Q. So, the 2011 report would be April 1, 2011, is that right?

13 A. Correct.

14 Q. And the report for 2011 is actually for -- through  
15 December 31, 2010, right? The data?

16 A. Right. The data is for 2010.

17 Q. All right. So, for 2011, the 2010 data, we have black  
18 males at 23.8 percent of the Sworn Protective Service, right?

19 A. Correct.

20 Q. And we have Fire with 53.7 percent of the discipline  
21 hitting those -- that 23.8 percent of the labor force, right?

22 A. Correct.

23 Q. And, as you say, if you were to look at numbers, you would  
24 be able to figure out whether every one of those incidents was  
25 justified or whether it reflected a pattern of being more



1 harsh on blacks than whites, right?

2 A. I can't speak for that.

3 Q. Well, but, that would be the next step when you have data  
4 like this that suggests that blacks are getting more  
5 discipline, right? You'd want to know whether it's because of  
6 discrimination, right?

7 A. I can't speak to that. I couldn't -- I'd be speculating.

8 Q. Well, you're an investigator, right?

9 A. That's correct.

10 Q. So you'd know how to look at those incidents and satisfy  
11 yourself that each one individually was justified. And if it  
12 falls more heavily on blacks, that's just the way your fair  
13 system operates, right?

14 A. We have 750 firemen and 16 of them were disciplined and --  
15 23 blacks were disciplined and 16 whites were disciplined.  
16 You know, it's just on a case-by-case basis to me. I don't  
17 look at it who's coming in my office, what's their color. If  
18 I find the case frivolous, you know, it won't get by me.

19 MR. GERHARDSTEIN: Would you read the question back?  
20 (At which time the court reporter read back the following  
21 question:

22 "Q. So you'd know how to look at those incidents and  
23 satisfy yourself that each one individually was justified.  
24 And if it falls more heavily on blacks, that's just the  
25 way your fair system operates, right?")

1 Q. Can you answer that yes or no?

2 A. I can't answer that. That's -- I'd be speculating.

3 Q. So, you don't even know whether you could look at the data  
4 we just talked about and figure out if the higher level of  
5 discipline against blacks was a reflection of discrimination  
6 or not? You think that's speculation?

7 A. There's a lot of variables.

8 Q. First answer the question. Do you think that's  
9 speculation?

10 A. I'd be speculating, yes.

11 Q. In your years in Internal, have you ever been asked to  
12 explain the higher incidence of discipline against blacks in  
13 the Fire Department?

14 A. No, I have not.

15 Q. Okay. You were talking about your investigation of the  
16 Potter charges at the beginning of your testimony. Do you  
17 recall that?

18 A. Yes, sir.

19 Q. And you looked at Defense Exhibit 4. I'm sorry. We're  
20 gonna have to build bigger witness boxes or go totally  
21 electronic.

22 A. Okay.

23 Q. And Defense Exhibit 4 is your entire investigative file  
24 for your investigation of the Potter fire, right? I'm sorry,  
25 the Potter charges?

1 A. My summary.

2 Q. Right. But all the pages behind it, is that your whole  
3 file?

4 A. There's three pages to my summary.

5 Q. Right. But aren't there a lot of other pages in the  
6 exhibit?

7 A. Those are the charges --

8 MR. GERHARDSTEIN: May I approach, Your Honor?

9 THE COURT: You may.

10 (Mr. Gerhardstein assisting the witness.)

11 THE WITNESS: Yes.

12 MR. GERHARDSTEIN: Thank you, Judge.

13 THE COURT: Sure.

14 Q. So, taking that fistful of documents, and take your time,  
15 can you tell me whether that's your whole file?

16 A. I couldn't tell you. I'd be speculating if it's the whole  
17 file.

18 Q. Okay. So --

19 A. I don't memorize every file.

20 Q. I only ask because you testified that you interviewed a  
21 lot of people.

22 A. Yes.

23 Q. But there are no summaries of your witness interviews in  
24 that --

25 A. Transcript.

1 Q. -- collection of documents?

2 A. (Nodding head affirmatively.)

3 Q. Would you normally have witness interviews?

4 A. Yes, we would.

5 Q. Okay.

6 A. Probably have them on the internal hard drive. They  
7 probably didn't transcribe them because they didn't go through  
8 a hearing.

9 Q. Okay.

10 A. Normally if they go to a hearing, they're transcribed.

11 Q. You said in there in your testimony that you didn't  
12 interview Ron Evans, right?

13 A. No. Ron Evans hadn't been to work for two years.

14 Q. And you say you didn't interview Lieutenant Broach?

15 A. That's correct.

16 Q. But you also said that Lieutenant Broach called you and  
17 gave you some information about --

18 A. Early on.

19 Q. -- the fire, right?

20 A. Early on.

21 Q. So that was after you had the case, right?

22 A. Correct.

23 Q. 'Cause he wouldn't have known to call you, right?

24 A. Right.

25 Q. But before you had done -- before you had completed the

1 case, right?

2 A. Before I started the case, yes.

3 Q. Well, by him calling you and offering information about  
4 the fire, it was clear that he wanted to tell you what  
5 happened, right?

6 A. Well --

7 Q. Is that true or not? First -- first, just say yes or no,  
8 and then you can explain.

9 A. Yes.

10 Q. Okay.

11 A. It's true.

12 Q. Okay.

13 A. Can I explain?

14 Q. Yes.

15 A. You said you'd give me the opportunity to explain it.

16 Q. Yes. Please do.

17 A. While the incident is being investigated, I won't talk to  
18 any of the -- the -- the people involved in the investigation  
19 until I'm ready to talk to them.

20 Q. So, did you give him a date to call back on?

21 A. No, I didn't give him a date to call back. I didn't know  
22 when --

23 Q. Did you explain to him that you wanted to talk to him and  
24 that he was just calling in too early?

25 A. No, I didn't explain that to him. I don't have to explain

1 that to him.

2 Q. Did you want to know what he had to say?

3 A. At some point, yes.

4 Q. Weren't you curious about his name and Ron Evans' name  
5 were matched together so many times in those Potter charges?

6 A. No. It didn't occur to me.

7 Q. That didn't raise any --

8 A. No.

9 Q. -- questions for you?

10 A. No, it did not.

11 Q. And you explained to the jury some of the things he said  
12 in that phone call, right?

13 A. That is correct.

14 Q. But there's no record of that phone call in the file in  
15 Exhibit 4, is there?

16 A. Because I told him I could not talk with him at the time.

17 Q. So, you're just remembering now three years later what he  
18 said in the phone call and you didn't write down, is that  
19 correct?

20 A. I remembered it because he wanted to file charges against  
21 his own company members.

22 Q. So, you're remembering something that you think is wrong,  
23 but you didn't write anything down from that phone call,  
24 right?

25 A. I did not expect him to go off on stress leave and stay

1 off for five months. I had no --

2 Q. Okay, sir.

3 A. I didn't have any idea that was going to happen.

4 Q. My question was, you didn't write anything down, right?

5 A. Correct.

6 Q. Okay. Lieutenant Broach and you have been with the Fire  
7 Department about the same length of time, right? You have a  
8 couple years more, I think?

9 A. That's correct.

10 Q. All right. And Lieutenant Broach had never filed a  
11 discrimination case prior to 2010, had he?

12 A. I can't recall. I started in 2009.

13 Q. And you never investigated Lieutenant Broach for anything  
14 prior to the Potter charge, right?

15 A. I can't recall.

16 Q. When you started working with Lisa Berning on her  
17 processing of Broach's EEO complaint, did she share with you  
18 her policy book on how she operated?

19 A. I never worked with her. I helped her.

20 Q. Okay. Did she share with you her policy book?

21 A. No, she did not.

22 Q. So, did you ever see Chapter 3 of her policy book which  
23 details all the things that an EEO person should do to  
24 investigate a claim of discrimination?

25 A. No, I never saw Chapter 3.

1 Q. Apparently, Lisa Berning told you that she had made a  
2 finding of Unfounded with respect to Broach's EEO charge, is  
3 that right?

4 A. Something to that effect.

5 Q. She never should --

6 Go ahead.

7 A. I can't remember what she said. I think she pointed it  
8 out somehow with -- with not finding anything.

9 Q. So your understanding --

10 A. I can't remember the exact words.

11 Q. Your understanding, in your parlance, is Unfounded or  
12 Unproven, correct?

13 A. That is correct.

14 Q. And she never showed you any written findings, right?

15 A. She didn't have to show it to me. She would share that  
16 with Administration.

17 Q. My question was, she never showed you any written  
18 findings, right? Is that correct?

19 A. That's --

20 Q. Yes or no, please.

21 A. No.

22 Q. She didn't, right?

23 A. No, she didn't.

24 Q. Okay. You understood that Lieutenant Broach was accusing  
25 Campbell of race discrimination, right?



1 A. That's correct.

2 Q. And as an African-American lieutenant yourself, you agreed  
3 that if your captain was a racist, you couldn't work for him,  
4 right?

5 A. I probably have worked for racist captains in my career.

6 Q. I'm sorry, sir. I am actually asking you about the  
7 dialogue during the EEO meetings.

8 And my question is, as an African-American lieutenant  
9 yourself, you agreed when you talked to Lieutenant Broach that  
10 if your captain was a racist, you couldn't work for him. Is  
11 that right?

12 A. That's correct.

13 Q. And Lieutenant Broach asked you if you believed that there  
14 were any people working for the City who were racists and your  
15 response was, "I'm sure there's quite a few." Isn't that  
16 right?

17 A. That's correct.

18 Q. And you still believe that, right?

19 A. That's correct.

20 Q. So it's important to thoroughly investigate claims of  
21 discrimination in order that people not act on that racism,  
22 right?

23 A. If you're going to comment on the meetings, can I make a  
24 statement on the meetings?

25 Q. No. I'm sorry. You know, we have a system --

1 A. Okay.

2 Q. -- and I get to ask questions, and you know this because  
3 you're an investigator and you usually get to ask the  
4 questions. And I know this is frustrating --

5 A. Yeah, it is.

6 Q. -- but please work with me. Okay?

7 A. I'm trying very hard.

8 Q. Well, thank you.

9 MR. GERHARDSTEIN: Can you read the question back?

10 THE WITNESS: Read it back.

11 (At which time the court reporter read back the following  
12 question:

13 "Q. So it's important to thoroughly investigate  
14 claims of discrimination in order that people not act on  
15 that racism, right?")

16 A. That's fair.

17 Q. Okay. And once you said in your meeting with Lieutenant  
18 Broach on October 13th that you agreed that there were quite a  
19 few racists working for the City, Berning said, "I'd like to  
20 keep my rose-colored glasses on and believe that's not true."

21 Didn't she say that?

22 A. That's correct.

23 Q. So, if the person responsible for investigating Mark  
24 Broach's discrimination claim admitted to having rose-colored  
25 glasses on and didn't want to believe that there were racists

1 working for the City, didn't that raise any concerns for you?

2 A. Are we talking about the meetings again? I thought they  
3 were stricken, we couldn't talk about the meetings.

4 You want to talk about the meetings?

5 Q. Hold on.

6 MR. GERHARDSTEIN: Just read the question back,  
7 please.

8 A. I would like to talk about the meetings.

9 (Laughter.)

10 Q. You know what? She's going to get up and ask more  
11 questions and then you'll feel better. Trust me.

12 (At which time the court reporter read back the question  
13 as follows:

14 "Q. So, if the person responsible for investigating  
15 Mark Broach's discrimination claim admitted to having  
16 rose-colored glasses on and didn't want to believe that  
17 there were racists working for the City, didn't that raise  
18 any concerns for you?")

19 A. No, it did not.

20 Q. Now, did Lisa Berning talk to you about Chapter 2 of her  
21 policies regarding mediation?

22 A. No, she did not. I was not there --

23 I was there to help with Fire Department policy and  
24 procedures.

25 Q. Did she explain to you that she was conducting a mediation

1 on October 6th and October 13th?

2 A. With? The scheduled meetings with Lieutenant Broach and  
3 Captain Campbell?

4 Q. Yes.

5 A. Yes, I was involved in that.

6 Q. And did she give you any instruction as to at what point  
7 you could speak up and on what issues you could speak up?

8 A. It was an informal meeting and there were no instructions.

9 Q. Okay. Were you one of the mediators?

10 A. No, I was not. I was there to assist Lisa with the  
11 policies and procedures.

12 Q. Would you agree that at times you were confrontational  
13 with Lieutenant Broach?

14 THE COURT: Yes or no.

15 A. Yes.

16 Q. And would you agree that at times Lisa Berning was  
17 confrontational with Lieutenant Broach?

18 A. I think it was the other way around: Lieutenant Broach  
19 being confrontational.

20 Q. When you discussed the Potter charges in these meetings  
21 with Lisa Berning and Lieutenant Broach, did you also discuss  
22 the email that Captain Potter had sent out following the time  
23 he fell through the floor of a burning building?

24 A. Who brought this up?

25 Q. It was attached to the March 2010 charge of discrimination

1 filed by Lieutenant Broach.

2 A. I don't remember talking about that.

3 Q. Okay. So, you're an investigator, right?

4 A. Yes, sir.

5 Q. Let's assume that a black person files a charge of  
6 discrimination. Okay?

7 A. Yes, sir.

8 Q. That act by the African-American person of filing a charge  
9 of discrimination is a protected activity, right?

10 A. Yes, sir.

11 Q. And you know that the City can't retaliate against that  
12 person simply because he filed a charge of discrimination,  
13 right?

14 A. Yes, sir.

15 Q. And you know that the City can't retaliate against that  
16 person simply because he would oppose discrimination, right?

17 A. Yes, sir.

18 Q. And the City also can't retaliate against that person for  
19 participating in the EEO process, right?

20 A. Correct.

21 Q. Okay. Do you think it's even possible for a black person  
22 to retaliate against another black person?

23 A. It's possible.

24 Q. And do black -- do all black people treat all other black  
25 people equally?

1 A. Probably not.

2 Q. Some blacks discriminate against other blacks with lighter  
3 skin, right?

4 A. If you say so.

5 Q. Well, you've seen that, right?

6 I mean, have you ever gone down Gilbert and seen the  
7 beauty shop with all the light-skinned women and no  
8 black-skinned women? Something's going on there, right?

9 A. I don't pay attention. I can't speculate.

10 Q. Would you agree that blacks can collaborate with others  
11 who are engaging in race discrimination?

12 A. They can --

13 Q. Okay.

14 A. -- I guess.

15 Q. Take a look at Plaintiff's Exhibit 27. You see that?

16 A. Yes.

17 Q. So, on January 18th, there is an anonymous email sent to  
18 Chief Wright accusing Captain Campbell of creating a hostile  
19 work environment and of racial intolerance. Do you see that?

20 A. Yes, sir.

21 Q. Was this complaint ever referred to you for investigation?

22 A. No, sir.

23 Q. Have you ever seen this before?

24 A. Never seen it before in my life.

25 Q. Well, Chief Wright is black, right?

1 A. Right.

2 Q. And Chief Wright sends the email, forwards it to Chief  
3 Rick Reed at AOL, his private email.

4 And that's Howard Reed, right?

5 A. I'd speculate. I don't know Howard Reed's personal --

6 Q. You know that Howard Reed's nickname is Rick, right?

7 A. No, I don't. It's the first I've heard of that.

8 Q. You know that Howard Reed would sign his name Howard,  
9 right?

10 A. I don't -- I'd be speculating how Howard would sign his  
11 name. I have no idea.

12 Q. You know that Howard Reed's been on the Fire Department  
13 longer than you have, right?

14 A. Yes.

15 Q. And Howard Reed's been very active in the African-American  
16 Firefighters Association, right?

17 A. I'd be speculating. I don't know his activities.

18 Q. Your brother was an officer of the African-American  
19 Firefighters Association, right?

20 A. That is correct.

21 Q. You're a member of the African-American Firefighters  
22 Association, right?

23 A. That's correct.

24 Q. You went to a lot of their meetings, right?

25 A. Not -- 20 years, probably.

1 Q. You know who Howard Reed is, right?

2 A. I know who Howard Reed is.

3 Q. And he's a district chief, right?

4 A. Retired.

5 Q. Yeah. And you know he's retired, right?

6 A. Yes.

7 Q. Okay. So Robert Wright says to Howard Reed, "No name  
8 complaint. I can figure out if Ron sent this."

9 That's Ron Evans, right?

10 A. I'd be speculating. I don't know.

11 Q. And then Chief Reed writes back saying, "No, I think it's  
12 Lieutenant Broach. He's the real snake here."

13 Did I read that correctly?

14 A. Correct.

15 Q. So, you know that Howard Reed and the Fire Chief were very  
16 close friends, right?

17 A. I couldn't -- I'd be speculating.

18 Q. Your brother Henry was a --

19 What was he, secretary of the African-American  
20 Firefighters?

21 A. I don't know what his position --

22 Q. He was on the Executive Board, right?

23 A. Correct.

24 Q. And you were a member for many years of the  
25 African-American Firefighters, right?



1 A. I've been nonactive for probably 20 years now.

2 Q. Right. But you're a member, right?

3 A. Yes.

4 Q. And you know that Lieutenant Mark Broach never joined the  
5 African-American Firefighters, right?

6 A. That's the first I've heard of that.

7 Q. You weren't aware of that?

8 A. No.

9 Q. So tell me what the Cincinnati African-American  
10 Firefighters Association is.

11 A. I'm still trying to figure that out myself. That's why I  
12 haven't been an active member in it.

13 Q. Your brother, who's on the Executive Board, never gave you  
14 a clue?

15 A. No, he didn't. He didn't give me a clue.

16 Q. Organization, trying to secure the rights of  
17 African-Americans. Right?

18 A. I would like to think so.

19 Q. And Robert Wright was appointed Police Chief in 1997?

20 A. Fire Chief.

21 Q. Sorry. Thank you. Fire Chief in 1997?

22 A. Yes, sir.

23 Q. And at that time it was an internal process, right?  
24 Didn't hire from the outside?

25 A. Right.

1 Q. And he was a great test-taker, right?

2 A. I'd be speculating.

3 Q. I mean, over the years he did really well on the Civil  
4 Service test, right?

5 A. I assume. I'm speculating.

6 Q. He was the first African-American Fire Chief in the city?

7 A. That's correct.

8 Q. But after he became Fire Chief, EEO problems didn't stop,  
9 right?

10 A. I'd be speculating. I worked in Internal for four years  
11 and I've only seen a couple.

12 Q. Well, you've already agreed that there are racists working  
13 in the city, right? Isn't that right?

14 A. I never agreed to it. I said I would guess so. I don't  
15 know for sure. I can't pick out any, point you in their  
16 direction, no.

17 Q. In -- after Chief Reed -- I'm sorry.

18 After Chief Wright was appointed, there were some public  
19 race issues that came up, including -- remember a column by  
20 Peter Bronson that criticized the hiring standards that was  
21 posted on a Fire Department bulletin board?

22 A. I can't recall.

23 Q. You don't recall the EEO investigation that followed that?

24 A. No, I don't.

25 Q. How about when Fire Chief Wright fired the chaplain who

1 was white and who he thought was raising problems among the  
2 black firefighters: Do you remember that?

3 A. I would be speculating on --

4 That was all handled by Chief Wright's administration. I  
5 was on Ladder 29 at the time. I concentrated on my men,  
6 checking my men and the public. I don't remember the  
7 incident, no.

8 Q. Well, you know the incident happened, right?

9 A. I know the chaplain was fired.

10 Q. Okay.

11 A. That's all I know about it. I didn't investigate it. I  
12 wasn't part of Internal at the time.

13 Q. And you know that in 2001 over a hundred black  
14 firefighters walked out of the union, right? That was a  
15 really big deal right after the riots. You remember that,  
16 right?

17 A. Vaguely.

18 Q. Okay. So, eventually the black firefighters resolved  
19 their differences and came back into Local 48, right?

20 A. I never left.

21 Q. Okay. But you know that suddenly a lot of the  
22 firefighters who had walked out had rejoined, right?

23 A. I'd be speculating. I don't know how many rejoined. I  
24 don't know how many exited. I can't answer that question for  
25 you.

1 Q. And you know that in the mid-2000s, the City Manager of  
2 Cincinnati started publicly raising questions about firehouses  
3 being segregated. Do you remember that?

4 A. I don't remember that.

5 Q. Well --

6 A. Firehouses --

7 Q. Well, you'd agree that there's a racial imbalance in the  
8 staffing of firehouses, right?

9 MS. POWELL: Objection.

10 THE COURT: Hold on.

11 A. I worked at Engine --

12 MR. GERHARDSTEIN: Hold on.

13 SIDEBAR CONFERENCE:

14 MS. POWELL: The reason for my objection is that this  
15 line of questioning is going way beyond the items I brought up  
16 in direct examination with him.

17 THE COURT: Okay.

18 MR. GERHARDSTEIN: This line of questioning goes to  
19 his conclusion that all the disciplines -- and in fact that's  
20 what they have testified to. And if there is a way to look at  
21 the big picture and see that a person could legitimately feel  
22 that he is the victim of discrimination because of disparate  
23 discipline and that he's been targeted, then you can  
24 understand the reasonableness of him questioning his own  
25 discipline.

1 MS. POWELL: And I understand the point you're trying  
2 to make. That's the point that should have been made in  
3 plaintiff's case-in-chief, and it's beyond the items that I  
4 raised with the lieutenant in his direct examination.

5 I just think we're way far afield the confines of what I  
6 asked questions about. If they had wanted to ask him these  
7 kind of questions, quite frankly, bring the witness in to talk  
8 about expert -- to talk about disparate impact and how this is  
9 the big-picture discipline. They could have done that in  
10 their case and they're trying to blow up the narrow opening of  
11 that and into a lengthy dissertation of race discipline  
12 statistics and the history of civil rights in the fire fight  
13 -- Fire Department, and it's just going way beyond what I  
14 asked him.

15 THE COURT: Okay.

16 MR. GERHARDSTEIN: Directly suggested that because  
17 he's black, he would be more fair. That's why they have him  
18 testifying about the meetings. And I think it's important  
19 that he be thoroughly cross-examined on these items. And I'm  
20 not belaboring it. I'm simply raising some of the themes that  
21 would assist the jury in evaluating his testimony.

22 THE COURT: After the question about the segregation  
23 of the stations, how many other examples would you want to  
24 give?

25 MR. GERHARDSTEIN: I think that's about it.

1 THE COURT: All right. One more.

2 MR. GIGLIO: Note our objection.

3 MS. POWELL: Note our standing objection.

4 CONCLUSION OF SIDEBAR CONFERENCE

5 BY MR. GERHARDSTEIN:

6 Q. You'd agree that even today there are some all-white  
7 firehouses and some that are almost all black, right?

8 A. That is correct.

9 Q. And that's largely because the union contract has always  
10 supported people being able to choose what firehouse they'd  
11 work in by seniority, with some exceptions for the  
12 administration to override that with administrative staff,  
13 right?

14 A. That's correct.

15 Q. But that issue is one that the African-American  
16 Firefighters' Association and Local 48 actually agreed on.  
17 They didn't want to change it, right?

18 A. It's up to the individual. I worked in Ladder 29 for  
19 15 years; all-white firehouse, I was the only black.

20 Q. I'm sorry, sir. Could you answer the question?

21 A. What was your question again?

22 MR. GERHARDSTEIN: Would you read it back, please?

23 (At which time the court reporter read back the following  
24 question:

25 "Q. But that issue is one that the African-American

1        Firefighters' Association and Local 48 actually agreed on.  
2        They didn't want to change it, right?")

3        A.    I can't answer that.    I don't know of any agreement like  
4        that.    I didn't pay attention to it.    I worked wherever I  
5        wanted to work.    I didn't pay attention to what house is all  
6        white and what house is all black.    It didn't matter to me.

7        Q.    Kevin Campbell was the Trustee of Local 48, right?

8        A.    I'd be speculating.    I don't know what he does.

9        Q.    This anonymous email to Chief Wright accusing Kevin  
10        Campbell of discrimination, if this had been referred to you,  
11        you could have investigated it at Internal, right?

12        A.    That is correct.

13        Q.    And you had the power to investigate everybody from the  
14        chief on down, right?    You and your captain?

15        A.    That is correct.

16        Q.    And once you were involved in Lieutenant Broach's claim of  
17        discrimination against Campbell --

18        A.    I was never involved in the claim.

19        Q.    Once you assisted Lisa Berning --

20        A.    Right.

21        Q.    -- in her work on Lieutenant Broach's claim of  
22        discrimination, it would have been helpful for you to know  
23        about this, right?

24        A.    No.

25        Q.    It would have been helpful for Lisa Berning to know about

1 it, wouldn't it?

2 A. It's the chief's discretion, the Fire Chief.

3 Q. So, the reason this would not have been sent to Internal  
4 was that this Fire Chief didn't send it, right?

5 A. That's correct.

6 Q. And that's the same fire chief who's in dialogue on this  
7 email with Rick Reed about whether the complaint came from Ron  
8 or from Lieutenant Broach who's referred to as a snake, right?

9 A. That's correct.

10 Q. The EEO meetings that ended with the agreement on October  
11 13th, would you agree that if Broach had simply declined --  
12 let me back up.

13 Those EEO meetings were voluntary, right?

14 A. That's correct.

15 Q. So, would you agree that if Broach had declined to  
16 participate in the EEO meetings between you and Captain  
17 Campbell and Berning, that there never would have been a  
18 referral for fitness for duty?

19 A. That is correct.

20 (Counselors Gerhardstein and Branch confer privately.)

21 MR. GERHARDSTEIN: I don't have any more questions.

22 THE COURT: Thank you.

23 Ms. Powell?

24 REDIRECT EXAMINATION

25 BY MR. POWELL:



1 Q. Lieutenant Lemons --

2 A. Yes.

3 Q. -- in your opinion, was Lieutenant Broach referred out for  
4 fitness for duty because of filing the EEO complaint, or was  
5 it because of his failure to accept responsibility and  
6 demonstrate his ability to accept responsibility for a unit of  
7 firefighters?

8 MR. GERHARDSTEIN: Objection, Your Honor.

9 THE COURT: I'm sorry. We completely went through  
10 the morning break. You guys want to take a break or wait till  
11 lunch? Keep going? Is it okay to keep going? Yeah? Are you  
12 sure?

13 JUROR NO. 2: Yes.

14 THE COURT: All right. Let's have a sidebar on that  
15 end.

16 SIDEBAR CONFERENCE:

17 THE COURT: They looked so interested, I completely  
18 forgot about the break.

19 MR. GERHARDSTEIN: Her question goes to the ultimate  
20 question, in his opinion, and then he's supposed to give an  
21 answer, I guess. And he's already testified that he wasn't  
22 involved in the decision to do the fitness for duty. And I  
23 was careful in my questions to just talk about the sequence.  
24 If he hadn't participated, then there'd be no fitness for  
25 duty.

1       So I haven't tendered him as an expert on this. And I  
2 don't think it's an inappropriate question. I think it goes  
3 -- it's unfair.

4           MS. BRANCH: And leading.

5           THE COURT: And I was confused by it.

6           MS. POWELL: I can rephrase the question, but  
7 essentially the jury should be able to hear from him -- well,  
8 first of all, let me start Mr. Gerhardstein finished his last  
9 question, "But for the EEO complaint, would this  
10 fitness-for-duty evaluation have occurred?" And the City has  
11 always maintained it's not the EEO complaint that resulted in  
12 the fitness-for-duty evaluation. It's the behavior and the  
13 denial of responsibility during the meetings that resulted in  
14 the fitness-for-duty evaluation.

15           MR. GERHARDSTEIN: And what my question was, was but  
16 for his participation in those meetings there wouldn't be a  
17 fitness for duty, and he agreed to that.

18           MS. POWELL: But for his being a firefighter, he  
19 wouldn't have been.

20           MR. GERHARDSTEIN: Well, you can ask him that. I  
21 mean, that's fine. But --

22           MS. POWELL: He was present at the meetings and he  
23 should be able to testify as to what the behavior within the  
24 meetings was that gave rise to the referral, in his opinion.

25           MR. GERHARDSTEIN: He said he wasn't involved in the

1 referral. He was making it up after the fact then.

2 THE COURT: I agree.

3 MS. POWELL: Okay.

4 THE COURT: Move on.

5 CONCLUSION OF SIDEBAR CONFERENCE

6 BY MS. POWELL:

7 Q. Lieutenant Lemons, is it part of your duty as an  
8 investigator to analyze the statistics from your -- your  
9 investigation outcomes?

10 A. No.

11 Q. Do you have any duties to analyze the racial makeup of the  
12 Fire Department as it relates to firefighter discipline  
13 statistics?

14 A. No.

15 Q. And in this case you did not uphold the February 2010  
16 charges against Lieutenant Broach?

17 A. I found them to be inconclusive.

18 Q. You were asked about the statement that Lisa Berning made  
19 in one of those October meetings. And do you remember the  
20 question about whether she made a statement about wearing  
21 rose-colored glasses and she didn't want to believe that  
22 racism existed?

23 A. Yes.

24 Q. What was your understanding of what she meant by that  
25 statement?

1 A. To me, it meant she would like to think that everyone  
2 treated everyone fairly.

3 Q. Did you get any sense -- strike that.

4 MS. POWELL: One minute.

5 (Defense Counsel confer privately.)

6 Q. I'm gonna have you turn to Defendant's Exhibit -- it's  
7 Defendant's Exhibit 7.

8 I apologize, Lieutenant Lemons. It's Joint Exhibit VI.

9 A. VI. Okay. Okay.

10 Q. I'm gonna have you turn to the bottom right. It's going  
11 to be page 000704.

12 A. You said Exhibit VI, right?

13 Q. Correct.

14 THE COURT: It's this book on your right.

15 THE WITNESS: Sorry.

16 A. Which page again?

17 Q. The bottom right, 000704.

18 A. Okay.

19 MS. POWELL: Permission to publish?

20 THE COURT: Any objection?

21 MR. GERHARDSTEIN: No.

22 THE COURT: You may.

23 Q. So, can you read for us what the conversation was when  
24 there was a discussion about whether there were racists in the  
25 city?

1 A. "Do you think there's any people in the city that might be  
2 racist?

3 Myself: "I'm sure there's quite a few."

4 Ms. Berning: "I'd like to keep my rose-colored  
5 glasses on and believe that's not true."

6 Lieutenant Broach: "I think that" -- "I think that  
7 would be a fantasy; wouldn't it?"

8 At the bottom:

9 Ms. Berning: "But I guarantee you that nobody better  
10 do it in front of me."

11 Q. So Ms. Berning says, "But I guarantee you that nobody  
12 better do it in front of me"?

13 A. That's correct.

14 Q. What was your understanding of what she meant by that  
15 statement?

16 MR. GERHARDSTEIN: Objection, Your Honor. Talk about  
17 his impression; her being --

18 THE COURT: Rephrase.

19 Q. What was your --

20 What was your impression of what she meant when she said  
21 that?

22 A. That she would take action if that happened in front of  
23 her.

24 MS. POWELL: I don't have any further questions.

25 THE COURT: Mr. Gerhardstein, do you have any

1 questions?

2 MR. GERHARDSTEIN: One moment, Judge.

3 (Plaintiff's Counsel confer privately.)

4 MR. GERHARDSTEIN: No further questions, Your Honor.

5 THE COURT: Thank you.

6 At this time the jury may ask questions of this witness.

7 After the questions, we will take a very short morning break.

8 (Pause.)

9 (The Court reviewing the jurors' questions.)

10 THE COURT: May I see counsel at sidebar, please?

11 SIDEBAR CONFERENCE:

12 THE COURT: Okay. The first question:

13 "Did you or Captain Campbell know the performance  
14 ratings were in Lieutenant Broach's locker prior to the  
15 search? If so, how?"

16 MR. GERHARDSTEIN: No objection.

17 MS. POWELL: No objection.

18 THE COURT: "Are events from years past, whether  
19 unreported mistakes or closed cases of discipline, ground  
20 for requesting a fitness-for-duty evaluation?"

21 MR. GIGLIO: Could you repeat that?

22 THE COURT: "Are events from years past, whether  
23 reported mistakes or closed cases of discipline, ground  
24 for requesting fitness-for-duty evaluations?"

25 MS. POWELL: Well, I just was told I can't ask about

1 fitness for duty.

2 MR. GERHARDSTEIN: Yeah. It's not the --

3 THE COURT: "What would happen with Lieutenant  
4 Broach's EEO charge if he had not attended the meetings or  
5 at least --"

6 "What would happen with Lieutenant Broach's EEO  
7 charge if he had not attended the meetings with Lisa  
8 Berning and you?"

9 MR. GERHARDSTEIN: I don't have any objection to  
10 that. I don't know what he's going to say. He might say  
11 "don't know."

12 THE COURT: Second set of questions:

13 "Could someone other than a rep from Internal Affairs  
14 have assisted Lisa Berning at the EEO meeting? Like  
15 someone else from the Fire Department?"

16 MR. GERHARDSTEIN: No objection.

17 MS. POWELL: No objection.

18 THE COURT: "Is it policy to have a union rep present  
19 whenever an Internal Affairs rep is in the room?"

20 MR. GERHARDSTEIN: No objection.

21 MS. POWELL: Okay.

22 THE COURT: "If you felt as stated that you could  
23 leave the room, why didn't you leave?"

24 MR. GERHARDSTEIN: No objection.

25 MS. POWELL: No objection.

1 THE COURT: "Is the costume fire the same as the  
2 McMicken fire?"

3 MS. POWELL: No objection.

4 MR. GERHARDSTEIN: No objection.

5 THE COURT: No. 4: "You say you spend time in your  
6 role as internal investigator in training lieutenants.  
7 Could you elaborate on what kind of training and duties  
8 and responsibility of a lieutenant?"

9 MR. GERHARDSTEIN: No objection.

10 MS. POWELL: No objection.

11 THE COURT: "What is sworn duty and what do  
12 firefighters swear to?"

13 MS. POWELL: No objection.

14 MR. GIGLIO: No objection.

15 MR. GERHARDSTEIN: No objection.

16 THE COURT: No. 5: "If you were only at the meetings  
17 for terms and policies and procedures for Lisa, why were  
18 you asking Lieutenant Broach questions, like did you  
19 report firefighter for running from fire, et cetera?"

20 MR. GERHARDSTEIN: No objection.

21 MS. POWELL: No objection.

22 THE COURT: Six has several regarding the Ludlow  
23 fire.

24 "Where in the building was Mark Broach according to  
25 witnesses?"



1 MR. GERHARDSTEIN: No objection.

2 MR. GIGLIO: No objection.

3 THE COURT: "Have you ever personally sensed any form  
4 of racial discrimination towards you or other  
5 African-Americans in any way while serving in the Fire  
6 Department?"

7 MR. GERHARDSTEIN: No objection.

8 MS. POWELL: No objection.

9 THE COURT: "Have you ever felt any sort of  
10 retaliation was taking place after your investigation of  
11 Mark Broach?"

12 MR. GIGLIO: No objection.

13 MR. GERHARDSTEIN: No objection.

14 THE COURT: "How many EEO complaints do you  
15 personally investigate each year?"

16 MR. GERHARDSTEIN: No objection.

17 MR. GIGLIO: No objection.

18 MS. POWELL: EEO complaints?

19 THE COURT: Yes.

20 MS. POWELL: He doesn't investigate EEO complaints.

21 THE COURT: That will be his answer.

22 "Did you feel Lisa Berning was ever upset with Mark Broach  
23 for his lack of evidence?"

24 MR. GERHARDSTEIN: No objection.

25 THE COURT: Jessica?

1 MS. POWELL: No objection.

2 THE COURT: "To your knowledge, how many  
3 African-Americans were in Engine 34 at the time of Mark  
4 Broach's relief of duty?"

5 MR. GIGLIO: No objection.

6 MR. GERHARDSTEIN: No objection.

7 THE COURT: "Had any of them expressed concern or  
8 complained about race or retaliation issues?"

9 MR. GIGLIO: No objection.

10 MS. POWELL: No objection.

11 THE COURT: And, finally, "Did you hear Captain  
12 Campbell say anything negative or racially motivated about  
13 Lieutenant Broach?"

14 MR. GERHARDSTEIN: No objection.

15 MS. POWELL: No --

16 THE COURT: I'll ask the witness the question.

17 MS. POWELL: No objection.

18 THE COURT: Okay.

19 CONCLUSION OF SIDEBAR CONFERENCE

20 THE COURT: Lieutenant Lemons, I'm now going to ask  
21 you questions posed by the jury. After I have asked you these  
22 questions, each attorney will have an opportunity to follow up  
23 with you based on these questions. Okay?

24 THE WITNESS: Okay.

25 THE COURT: Did you or Captain Campbell know the

1 performance ratings were in Lieutenant Broach's locker prior  
2 to the search?

3 THE WITNESS: No, we did not. No, we did not.

4 THE COURT: Thank you.

5 What would happen with Lieutenant Broach's EEO charges if  
6 he had not attended the meetings with Lisa Berning and  
7 yourself?

8 THE WITNESS: I'd be speculating.

9 THE COURT: Okay.

10 THE WITNESS: I couldn't answer that question.

11 THE COURT: Could someone other than a rep from  
12 Internal Affairs have assisted Lisa Berning at the EEO  
13 meeting? Like someone else from the Fire Department?

14 THE WITNESS: There's only four people assigned to  
15 Human Resources: Myself, Captain Ransick, Chief Porter, and  
16 Chief Winston. I'm the lowest man on this totem pole, so I  
17 got the duty.

18 THE COURT: Is it policy to have a union  
19 representative present whenever an Internal Affairs  
20 representative is in the room?

21 THE WITNESS: Normally, yes. But an EEO complaint,  
22 no.

23 THE COURT: If you felt as stated that you could  
24 leave the room, why didn't you leave?

25 THE WITNESS: It was at Lieutenant Broach's request.

1 I asked him on several occasions "Did you want me to leave the  
2 room?" He indicated no.

3 THE COURT: Is the costume fire the same as the  
4 McMicken fire?

5 THE WITNESS: Yes.

6 THE COURT: You say you spend time in your role as  
7 internal investigator in training lieutenants. Could you  
8 elaborate on what kind of training and duties and  
9 responsibilities of a lieutenant?

10 THE WITNESS: Just mentoring the lieutenants. And,  
11 basically, you're the lieutenant going over our policies and  
12 procedures and letting them know what -- some of the traps  
13 that new lieutenants fall into when they go out.

14 THE COURT: What is the sworn duty and what do  
15 firefighters swear to?

16 THE WITNESS: To uphold the safety of the public.

17 THE COURT: If you were only at the meetings for  
18 terms and policies and procedures for Lisa, why were you  
19 asking Lieutenant Broach questions like did you report the  
20 firefighter for running from the fire?

21 THE WITNESS: Because I'm a firefighter, and I assume  
22 that part of me took over and I was upset that he would allow  
23 a member from his fire company to run away from the fire and  
24 not go and help with the extinguishment.

25 THE COURT: Regarding the Ludlow fire, where in the

1 building was Mark Broach according to witnesses?

2 THE WITNESS: He was kneeling at the doorway of the  
3 apartment. There was fire.

4 THE COURT: Have you ever personally sensed any form  
5 of racial discrimination towards you or other  
6 African-Americans in any way while serving in the Fire  
7 Department?

8 THE WITNESS: Like I said before, I spent 15 years at  
9 Ladder 29. That's an all-white firehouse. And it takes some  
10 getting used to, but over time you learn to -- to work with  
11 everybody. I can't say I experienced any racism, but it just  
12 took an adjustment to working with other people that you're  
13 not comfortable with.

14 THE COURT: Have you ever felt any sort of  
15 retaliation was taking place after your investigation of Mark  
16 Broach?

17 THE WITNESS: No, I did not.

18 THE COURT: How many EEO complaints do you personally  
19 investigate each year?

20 THE WITNESS: I don't personally investigate EEO  
21 complaints. It's handled at the City Human Resources. If  
22 they need me to assist with a case, then I'll assist.

23 THE COURT: Did you feel Lisa Berning was ever upset  
24 with Mark Broach or his lack of evidence?

25 THE WITNESS: On several occasions she asked him for

1 evidence to support his case and at no time did he present the  
2 evidence to support his case.

3 THE COURT: To your knowledge, how many  
4 African-Americans were in Engine 34 at the time of Mark  
5 Broach's relief of duty?

6 THE WITNESS: There were approximately 12 to 14  
7 members assigned to Engine 34.

8 THE COURT: Had any of them ever expressed concern or  
9 complained about race or retaliation issues?

10 THE WITNESS: Only Ron Evans and Mark Broach.

11 THE COURT: Did you hear Captain Campbell say  
12 anything negative or racially motivated about Lieutenant  
13 Broach?

14 THE WITNESS: No, I have not.

15 THE COURT: Thank you.

16 Based upon those questions and the responses, Ms. Powell,  
17 do you have any followup?

18 MS. POWELL: No further questions.

19 THE COURT: Mr. Gerhardstein?

20 MR. GERHARDSTEIN: Very briefly.

21 FURTHER EXAMINATION

22 BY MR. GERHARDSTEIN:

23 Q. Lieutenant, you're asked what are firefighters sworn to  
24 uphold and you said public safety.

25 They are also sworn to uphold the law, right?

1 A. The law?

2 Q. Yeah. The law with respect to EEO, the law with respect  
3 to other matters that interact with your job on the fire  
4 force, right?

5 A. Yeah, that's correct.

6 Q. Okay. And you were asked by one of the jurors did you  
7 feel Lisa Berning was ever upset with Mark Broach for his lack  
8 of evidence, and I didn't hear an answer.

9 A. Yes.

10 Q. Did you feel she was upset?

11 A. Yes.

12 MR. GERHARDSTEIN: I don't have any other questions.

13 THE COURT: All right. Thank you.

14 THE COURT: Okay. Lieutenant Lemons, thank you very  
15 much. You may step down.

16 THE WITNESS: Thank you.

17 (Witness excused.)

18 THE COURT: At this time we're going to take our  
19 morning recess.

20 Like all others, please do not discuss the case with  
21 anyone, including your fellow jurors, members of your family,  
22 anyone involved in the trial or anyone else.

23 Should anyone try to talk to you about the case, please  
24 let myself or Ms. Lahley or the Court Security Officers know.

25 Do not read, watch or listen to any news reports

1 throughout this case. Do not get on the Internet to do  
2 research, use blogs, Internet chatrooms or any other social  
3 media applications, do research or discuss the case.

4 Keep an open mind until all the evidence has been received  
5 by you and you've heard the views of your fellow jurors during  
6 deliberations.

7 It is now 11:06. Let's take a break until about  
8 11:15 A.M. About a ten-minute break.

9 (At 11:06 a.m., the jury was in recess.)

10 BEFORE THE COURT:

11 THE COURT: Captain Campbell's next?

12 MR. GIGLIO: He is here.

13 THE COURT: He's next and he's here. Okay. Thank  
14 you.

15 (At which time a recess was taken.)

16 \* \* \*

17 BEFORE THE COURT: (11:24 A.M.)

18 THE COURT: I would like to break for lunch as close  
19 to 12:30 as we can. So whoever is questioning, please be  
20 aware of the time. And if it's a little before or a little  
21 after, I'm fine with that.

22 They have indicated they would like to take a shorter  
23 lunch. So 30 minutes or so. Is that okay with all of you?

24 MS. BRANCH: Sure.

25 THE COURT: Okay.



1 BEFORE THE JURY: (11:24 A.M.)

2 THE COURT: Defendants ready to call their next  
3 witness?

4 MR. GIGLIO: Yes, Your Honor. We'll call Kevin  
5 Campbell. Captain Kevin Campbell.

6 THE COURT: Thank you.

7 Sir, if you could please approach the witness stand and  
8 raise your right hand to be sworn.

9 (Duly sworn by the Clerk.)

10 THE CLERK: Please be seated.

11 THE COURT: Thank you.

12 Please be seated and make sure you try and speak into the  
13 microphone.

14 THE WITNESS: Okay.

15 CAPTAIN KEVIN A. CAMPBELL

16 a witness herein, having previously been sworn, testified as  
17 follows:

18 DIRECT EXAMINATION

19 BY MR. GIGLIO:

20 Q. Good morning, Captain Campbell.

21 A. Good morning.

22 Q. Would you please state your full name for the record?

23 A. Name is Kevin Albert Campbell.

24 Q. And what is your present position with the City of  
25 Cincinnati?

1 A. Fire Captain, currently assigned to Emergency  
2 Communications Section.

3 Q. Are you from Cincinnati originally?

4 A. Yes, sir. Uh-huh.

5 Q. Are you married?

6 A. Yes. Four children.

7 Q. Four children?

8 A. Uh-huh.

9 Q. Before I get into your years of Cincinnati Fire  
10 Department -- I should probably start with that.

11 How many years have you been with the Cincinnati Fire  
12 Department?

13 A. I'm in my thirty-third year.

14 Q. Prior to joining the Cincinnati Fire Department, did you  
15 have any other jobs or employment?

16 A. Served in the United States Army. Went to U.C.; graduated  
17 from U.C. I had a number of other small jobs. Worked for  
18 Cincinnati Police Division for a while and slowly migrated to  
19 the Fire Division.

20 Q. In your many jobs -- well, did you have many different  
21 types of jobs while you were with the City Fire Department?

22 A. In the Fire Division, served as a firefighter roughneck on  
23 engine companies, ladder companies. Was promoted to fire  
24 apparatus operator.

25 Then in 1989, I was promoted to lieutenant. I served ten

1 years with the Bomb Squad just shy of ten years and was  
2 promoted Captain. Spent a year or two Downtown, and I spent  
3 the last ten years up in Engine 34, and transferred June of  
4 this year to Communications Section.

5 Q. You mentioned a bomb squad. Is there any special training  
6 that you would have for that type of position?

7 A. Yes, sir. All bomb technicians in the country are trained  
8 at the same facility, which is Redstone Arsenal in Alabama.  
9 You're selected for the process, background, screening through  
10 Justice Department, then sent to Redstone, trained, and  
11 hopefully complete your course work. You're trained by United  
12 States Army and civilian cadre.

13 Q. Have you been commended [verbatim] for your actions  
14 either in the Bomb Squad or just as a firefighter while you  
15 were employed as a City firefighter?

16 A. Yes, sir.

17 Q. Would you say more than once?

18 A. Oh, yes. Uh-huh. Ten, twelve, fifteen times. I'm -- I  
19 don't keep track.

20 Q. I'm going to ask you to look at Defense Exhibit -- there's  
21 some books in front of you.

22 A. Okay.

23 Q. There's a Plaintiff's Exhibit book, there's a Defense  
24 Exhibit book, and there's a Joint Exhibit book. I'd like you  
25 to look at the Defense Exhibit book.

1 A. Okay. I hope I have the right one.

2 THE COURT: That is.

3 A. Okay.

4 Q. And I'd like you to turn to Defense Exhibit 25.

5 A. Okay.

6 Q. Okay. Can you identify that document?

7 A. It's an organizational chart for the Fire Division.

8 Q. Turn the page. Is there an organizational structure  
9 manual in that exhibit?

10 A. Administration, I believe. Yes.

11 Q. Could you turn to page 7 of that organizational structure?

12 A. The pages aren't numbered, but --

13 Q. I believe if you look at the top of the printed manual, it  
14 will give a page out of 12, 7 out of 12.

15 A. Not on this one.

16 THE COURT: Ours are not numbered.

17 A. Okay. What's the title?

18 Q. It'd be --

19 (Counselors Giglio and Powell confer privately.)

20 Q. I'm going to --

21 A. Procedure manual, 7 out of 12.

22 Q. I tend not to speak loud. And if you don't tend to spoke  
23 loud, we'll give the court reporter a hard time. So --

24 A. I'm there.

25 Q. Good.

1       Okay. I'm going to put up on the screen here -- and  
2       that's where I got the page number at the top.

3       A. Okay.

4       Q. Okay. And this talks about the duties of fire captain.

5       A. Yes, sir.

6       Q. And without reading them, do you agree that --

7       Well, I should say without reading them, you don't have to  
8       read them all, but do you know just off the top of your head  
9       what your duties of a captain are?

10      A. I do. It basically follows this chart here. I'm  
11      commanded by procedures to follow this chart. And you could  
12      go right down the list. I'm responsible for the actions and  
13      disciplines of all members of the company.

14      Q. Okay.

15      A. We run a fire inspection program. In the Fire Division,  
16      we also maintain -- do all the maintenance on the fire  
17      hydrants that are assigned to us. We have close to 300 at  
18      Engine 34, so we -- we have a maintenance program that I  
19      direct the units. I also guide them on what fire inspection  
20      we should be doing. I'm also to be familiar with, you know,  
21      all the hazards in the area. Any specific buildings that have  
22      been condemned or bring the units up to date when things  
23      change in the neighborhood.

24      I'm responsible for the general condition of the  
25      firehouse. The -- responsible for all reports, maintenance.

1 Responsible for the apparatus, the equipment, any reports  
2 dealing with -- with that, those issues, and maintaining  
3 records on the company, which include the fire inspection and  
4 repair records, et cetera.

5 Q. And part of your duty's to be responsible for the actions  
6 and disciplines of your -- members of your house?

7 A. That's correct, to a certain level. After it goes to  
8 Internal, something like that, then it's out of my hands.

9 Q. Now, there are more than one unit in a house, am I right?

10 A. That's correct. We operate on a three-unit system. Each  
11 unit works 24 hours and then I oversee all three. But each  
12 one -- the other two units have a lieutenant assigned and  
13 they're responsible for basically the same things, and then  
14 following my lead on the inspection, hydrants and fire  
15 responses also.

16 Q. When we talk about the other units, when a lieutenant  
17 doesn't appear, do you still -- are you still responsible for  
18 all the units even though you're not on those units?

19 A. Ultimately, I ensure that the reports are -- are  
20 up-to-date, and they're responsible for certain things. It's  
21 kind of -- sometimes it's what -- they're responsible for all  
22 reports, all run reports for their shift, if the equipment's  
23 broken, properly reporting, and I follow up to make sure  
24 that's being taken care of.

25 Q. Okay. Do you know the plaintiff, Mark Broach?

1 A. Yes, I do.

2 Q. Okay. When did you first meet him?

3 A. Oh, I met him years ago. I was sent out to the house he  
4 was working to relieve him. I was on an overtime list. I had  
5 never met Mark before. I spoke to him a little bit that day  
6 and then in passing when he was assigned to Engine 34.

7 Q. Do you know when he was assigned to Engine 34,  
8 approximately?

9 A. 2007, I believe it was. 2006, somewhere around there.  
10 2007, I believe.

11 Q. Prior to his transfer, did you have any conflicts with  
12 him?

13 A. No, I did not know -- like I said, I ran into him. But he  
14 was cordial, polite. There was nothing that I had issue on.

15 Q. Do you know if you ran any fires with him before he came?

16 A. No.

17 Q. Now, you talked about your history at the 34's, Company  
18 34, and I think you mention one part of that time you  
19 transferred out.

20 Do you remember the dates that you -- proximate dates you  
21 transferred from the 34's?

22 A. I left -- it was during the winter. I think 2009. At the  
23 end of 2009, 2010. I left for a short while, went to Engine  
24 46 in Hyde Park.

25 Q. Okay. And why did you do that?

1 A. Two reasons. One, my son --

2 In the Fire Division, you have a scheduled off day, a day  
3 you never work. It's a Kelly day. And my son was --

4 (Court reporter requested the witness to speak louder.)

5 A. My son plays -- he played football at Colerain. And to  
6 ensure I was off on Friday -- they have Friday Kelly days. So  
7 the troops called me, a group of guys I worked for before, and  
8 asked me if I'd come out, and so I transferred there, based on  
9 that and a few other factors in our house that I was little  
10 frustrated with. So I went to Engine 46.

11 Q. Now, would you have been in Engine 46 in January and  
12 February of 2010?

13 A. Yes. Yes.

14 Q. You're aware that Mr. Broach brought a charge against you  
15 in March of 2010?

16 A. I'm aware?

17 Q. That he brought an EEOC charge.

18 A. Yes, right.

19 Q. Okay.

20 MR. GIGLIO: Publish? Place this on here.

21 Q. Is this the charge that you became aware of? The date's  
22 on the bottom. I'll just slide it down.

23 A. Yes.

24 Q. All right. And when did you become aware this charge was  
25 filed against you?



1 A. It was after I put a transfer request to come back to  
2 Engine 34, then this -- then I heard about this.

3 Q. Did you see the facts that were listed on Mr. Broach's  
4 claim?

5 A. Yes.

6 Q. You've seen that before?

7 And it says you spread negative information to surrounding  
8 fire companies. I'll start with that.

9 Do you recall any -- any basis for that complaint that you  
10 spread negative information to surrounding companies?

11 A. That is false. Absolutely false.

12 Q. All right. It says, "Causing Greg Potter to initiate  
13 racist charges."

14 Are you aware Mr. Broach was charged with discipline  
15 approximately January 18th of 2010 for a fire in your Engine  
16 34 jurisdiction?

17 A. Not initially. I was -- I was not in the district. I was  
18 in District 4, I was on Engine 46, and that all happened when  
19 I was out there. Very little knowledge of it.

20 Q. Okay. Did you know any knowledge of it before it was  
21 filed or after?

22 A. After what was filed?

23 Q. The charge. And I'll call it the Potter charge.

24 A. Okay.

25 Q. Did you know anything before it was filed?

1 A. No.

2 Q. I'm going to ask you the second part of it, the charges,  
3 your negative information which you deny caused Greg Potter to  
4 initiate the charges.

5 Is there any accuracy in that?

6 A. Say it again.

7 Q. Is there any truth in that?

8 A. Absolutely not. I've never spoken to Greg Potter about  
9 these charges. In fact, I never spoke to anyone about the  
10 fire until I ran into Lieutenant Kathman just a while back.  
11 Stupid.

12 Q. Were you contacted -- were you involved in the  
13 investigation?

14 A. No. No.

15 Q. Why would you be involved?

16 A. Number one, I wasn't there. Two, I'm not the Captain of  
17 Engine 34 at that time and I'm the Captain of Engine 46 and  
18 another fire district. There's no reason for him to contact  
19 me.

20 Q. Do you know now-District Chief Gregory Potter?

21 A. Yes.

22 Q. Okay. Did you ever work at the same engine company with  
23 him?

24 A. No.

25 Q. Are you friends with him outside of being -- professional

1 relationship at the firehouse? Do you socialize with him?

2 A. No, never.

3 Q. You probably -- I think you volunteered an answer. But  
4 did you have any input whatsoever in the drafting, placing, or  
5 comments made in the charges brought against Mark Broach by  
6 Greg Potter on January 18th?

7 A. I didn't know anything about it unless, like I said, down  
8 the road sometime.

9 Q. Uh-huh. Before -- before the fire of February 10th and  
10 more specifically before these charges were brought -- and  
11 I'll give you the date of January 18, 2010 -- 46's  
12 approximately?

13 A. Yes.

14 Q. Okay. I'm going to ask you did you discuss any issues  
15 that you had with either Mark Broach or Ron Evans with Gregory  
16 Potter?

17 A. No, not at all.

18 Q. Did Greg Potter have any communications with you -- and  
19 what I mean by that is emails, telephone, personal  
20 conversations -- regarding the bringing of his charge of  
21 February 18, 2010?

22 A. No, not at all.

23 Q. Now, I understand you eventually did return to Engine  
24 Company 34?

25 A. That's correct. Members of my immediate crew were -- they

1 asked me to come back. And each one of them, each one of  
2 those members I served approximately ten years with and I felt  
3 a loyalty to them. Each one I hand picked to -- to -- from  
4 the Downtown companies, and at one point in time as an opening  
5 came up, asked each of them to come up and serve, and they  
6 did. We had a pretty good unit. And they called me and they  
7 weren't happy I left. They understood the reasoning I left,  
8 but they asked me to come back, and I felt obligated to them  
9 because, you know, we believe in what we do and how we do it.  
10 And they had -- left their positions. And it is part of being  
11 a -- teamwork and being a leader.

12 Q. And talking about the members of your unit, what's the  
13 racial makeup of that unit?

14 A. They're all African-American. I'm the only Caucasian in  
15 my immediate group.

16 Q. When you returned, were you aware that Lieutenant Broach  
17 was off on stress or off of some leave?

18 A. Well, at that point I did inquire because he was a  
19 lieutenant assigned to the house and I obviously wanted to  
20 know what was going on.

21 Q. Did you have any conversations with Lieutenant Broach from  
22 the time of the fire on February 10th, even if you were at the  
23 46's, and at the time when you returned and he was out on  
24 stress?

25 A. No. No.

1 Q. Did you have any communications with him when he was out  
2 on stress leave?

3 A. No.

4 Q. Going back to when Lieutenant Broach transferred into the  
5 34's --

6 A. Okay.

7 Q. -- we talked about captain duties, people you supervise.  
8 Would Mr. Broach be in charge of preparing annual  
9 performance reviews for those subordinate to him?

10 A. That's correct.

11 Q. In 2007, did Mr. Broach come to you and ask for any  
12 assistance in the completion of performance evaluations?

13 A. That's correct. There was -- he was fairly new in the  
14 company and we were having a discussion out front and at that  
15 point I kind of went over what I go over with all new members  
16 what I expect out of them as far as how to make their  
17 response. It's critical to be first in your geographical  
18 area; you know, be on time. Just do the basics. Lay off the  
19 fire, which means you take a water source in with you. And  
20 then he asked me about Ron Evans. He said he didn't know much  
21 about him and asked how he should evaluate him, so I gave him  
22 some input. And --

23 (Counselors Giglio and Powell confer privately.)

24 MR. GIGLIO: Defense Exhibit 1 and Defense Exhibit 2.

25 (Counsel confer privately.)

1 MR. GERHARDSTEIN: No objection.

2 MR. GIGLIO: Okay. If I may, Your Honor?

3 THE COURT: You may.

4 Q. Going to show you what's been marked Defense Exhibit 1.  
5 Take a look at this document. The number's upside down here.  
6 You see that document, Captain?

7 A. Yes.

8 Q. All right. And it appears to be a memo from you. Is that  
9 right? An email from you?

10 A. It's an email from me to Mark Broach sent in 2007.

11 Q. Now, you said you sent it in 2007. Could you explain  
12 where on the document would help you know that you sent it in  
13 2007? And as you said, you forwarded the message 9/24?

14 A. If you look to the left of the screen, that's the  
15 timeline.

16 Q. This timeline here?

17 A. Yes, sir. When my emails are sent.

18 Q. You see references to Revised Performance there?

19 A. Right there.

20 Q. Do you know the date that you would have sent that?

21 A. Within sometime after May.

22 Q. All right. And I noticed you also have copies on that.  
23 At the time -- Stephen Kluesener, what was his position?

24 A. Stephen Kluesener was the District Chief on that -- that  
25 unit. Each -- each of the three units have a district chief

1 assigned to it. So the communication chain changes -- I'm  
2 sorry.

3 Q. Just take your time.

4 A. All right. The communication line goes from -- from Unit  
5 1, 2 and 3. But there's three distinct separate supervision  
6 chains.

7 So, Stephen Kluesener would be Mark Broach's immediate  
8 supervisor. Steven Phillips is my supervisor, my district  
9 chief. And then Ronald Texter was a district chief in the  
10 Safety Office who eventually would collect all the performance  
11 reviews.

12 So when I sent this to Mark, this was based on the  
13 conversation we had in 2007 about the 2006 performance report,  
14 and I copied all those supervisors, and noted at the bottom of  
15 that that the bottom line is he's responsible for it. If he  
16 wasn't comfortable with anything, he could -- he could change.

17 On the report itself, it does say you're the -- to put any  
18 commendations on there that happened in the past year or any  
19 discipline records for the past year.

20 Q. I'm going to show you Defense Exhibit 2. And this is a  
21 2007 evaluation of Ron Evans.

22 A. Okay.

23 Q. Okay. Let me show you all the way down so you can see the  
24 date it was signed, '07. You see that?

25 A. Okay.

1 Q. Do you know if that is Mr. Evans' signature to the right  
2 of that?

3 A. He kind of scribbled.

4 Q. All right. Now, you just mentioned about commendations  
5 and disciplines. Can you show me on the form where that  
6 appears?

7 A. Right there under Comments and Suggestions, it tells you  
8 right there.

9 Q. Includes disciplinary -- commendations, disciplinary  
10 actions. So all that stuff, you're supposed to put that in  
11 there, right?

12 A. Uh-huh.

13 Q. Since it was signed by Mr. Evans, would this have been the  
14 final one that was complete as far as you know?

15 A. For him, yes.

16 Q. All right.

17 A. It would have been --

18 Q. Okay. I know we read your email before regarding --

19 If I may ask this first. Was it regarding your -- his  
20 2007 evaluation hearing?

21 A. That's correct.

22 Q. All right. Did you order or tell Mr. Broach after he  
23 looked at it and after he got your email to change any of the  
24 X's on there?

25 A. No. No. I made it very specific in the email. I said it



1 in the last paragraph. The bottom line is, it rests with you.  
2 Your decision, your choice. The only thing they had to put on  
3 there is what it said up there as far as any disciplines or  
4 commendations is required.

5 But as far as the rest of it, it's his observations. He's  
6 free to make any changes. This is not about attacking  
7 somebody. This is about identifying a weakness and trying to  
8 turn it into a strength. You know, trying to get somebody to  
9 do corrective behavior or to improve or to acknowledge the  
10 good things they've done. So, it's -- you can use this as a  
11 tool-building, as a person-building and that's the way those  
12 are designed.

13 Q. Okay. When you look at all those and you see -- for  
14 instance, in this one, rules and regulations, he got a zero.  
15 But on the right it says, "Received a written reprimand for  
16 not following procedures and making appropriate payoffs."

17 A. Uh-huh.

18 Q. When you get a reprimand, does that directly affect your  
19 rating in that -- in a specific category?

20 A. It can. You're supposed to note it.

21 Q. Okay. And if you get a commendation, you might be over in  
22 the Outstanding column?

23 A. Possibly.

24 Q. Since we're on the subject, you've had an opportunity to  
25 review your performance evaluations over the years?

1 A. Yes, sir.

2 Q. And where would they generally fall?

3 A. Outstanding.

4 Q. Okay. Let me go back to Defense Exhibit 1 again, that  
5 email. Slide it all the way down.

6 You see -- and I apologize. There's a half-printed  
7 statement on the bottom. You see that?

8 A. Yes.

9 Q. Okay. It looks like Cincinnati, then I see Mark Broach's  
10 name on there.

11 What do you understand why that would be there?

12 A. That was Mark Broach forwarding that email to somebody.

13 Q. All right. And would that be why on the top up here it  
14 says you forwarded it on 9/24/09?

15 A. That's exactly what that is.

16 Could we see the top of that?

17 Q. Certainly. To clarify an answer?

18 A. All the way at the top. Okay.

19 Q. Okay. Does that help you? Okay.

20 A. What's that little mark on the left?

21 Q. I think -- if I can represent to you, I think it's the  
22 holes from a binder. I'm not representing it's accurate.  
23 That's just my interpretation.

24 Would that be yours as well? Is that what it looks like?

25 A. That's what it looks like.

1 Q. All right.

2 THE COURT: If that helps you, you can also look at  
3 the exhibit in your book.

4 THE WITNESS: Okay.

5 Q. You don't have to rely on the screen in front of you.

6 A. What exhibit is that?

7 Q. That was Exhibit 1.

8 THE COURT: Defense Exhibit 1.

9 Q. Defense Exhibit 1. Okay.

10 In regard to that same -- same line of questioning, I'm  
11 going to show you to -- look at Defense Exhibit 3, please.

12 MR. GERHARDSTEIN: No objection.

13 MR. GIGLIO: Thank you. May I publish?

14 THE COURT: You may.

15 Q. Show you Defense Exhibit 3. This looks to appear to be an  
16 email you sent to Lieutenant Broach in September of '07. Can  
17 you explain why you sent this in September of '07?

18 A. I believe this was a reprimand.

19 Q. Okay. Why did you feel it was necessary that he include a  
20 reprimand on his review?

21 A. Well, there was actually two. Chief Texter and I were in  
22 discussion about the actual dates of the evaluation from the  
23 -- January to December or from April to April. And he said  
24 that we should go April to April. And at that point there was  
25 a -- a discipline rendered in -- I'm not sure; sometime

1 between January and April. So that was to be included in the  
2 '07 report.

3 Q. Okay. So you were -- it was important to advise  
4 Lieutenant Broach that he needed to look at all the  
5 commendations, reprimands, for the entire reporting period?

6 A. That's correct.

7 Q. And that's why you sent it to him?

8 A. Right.

9 Q. You made -- you see the reprimand to Mr. Evans?

10 A. Uh-huh.

11 Q. All right. And do you know who gave him that reprimand?

12 A. For the -- yeah. That was for --

13 I actually gave that reprimand. And how it works in the  
14 Fire Division, to explain that, that we -- we pay for our own  
15 food, we pay for our own TV. Any -- any accessory we have,  
16 the firefighters pay for it. And we have -- we split the cost  
17 between the three of us, of all three shifts. And there's  
18 also an organization if a firefighter is injured or killed,  
19 then we all put up five dollars. It is called -- so we give  
20 that to the family. This is called a payoff. And each pay  
21 period when -- you come up with -- with a base number, which  
22 takes care of the fatalities; it takes care of all the house  
23 expenses.

24 I had -- Ron was -- was the only member who would not pay  
25 off. And you have an option to either be a part of this or

1 you can option out. Well, he optioned in and everybody  
2 optioned in, in the houses, and this went on for three years.  
3 And one year he paid off three times, another time he paid off  
4 -- I don't recall; it was less than the pay -- and another  
5 time, you know, five or six. And I kept talking to him. I  
6 didn't want it to go this far as being actually written  
7 discipline, but I never could get quite through to the guy.  
8 Even his officers had trouble with him paying off. And it's  
9 not fair to the other people. They're carrying his weight.

10 And, anyway, he was behind. There's 26 payoffs a year.  
11 You know, he was making three one year, five one year, six,  
12 and maybe eight another. And finally I said, "If you don't  
13 take care of it" -- we even noted it on his performance report  
14 so he'd correct it, but he was obstinate and actually refused  
15 to pay, and that's when I gave him a reprimand.

16 Q. Firefighters, are they -- can they be late on this?

17 A. Yeah. I think everyone's been late. But nobody's  
18 refused.

19 Q. Looking at the bottom, it says -- I think it's the last  
20 sentence -- "When asked in September by his immediate  
21 supervisor," who would that have been?

22 A. That should have been -- might have been Doug Rubin in  
23 '06.

24 Q. All right. At least his immediate supervisor. It wasn't  
25 you, correct?

1 A. No. Oh, that was Doug Ober, because I think there was --  
2 I think the City had taken some money out of his check, if  
3 memory serves right, and he said he wasn't going to pay off  
4 until the City paid him back, and really -- which isn't the  
5 firefighters' issue. It was just part of this continued  
6 pattern of not paying.

7 Q. And there's a quote in there where he allegedly stated he  
8 doesn't care if he's reprimanded or not. Do you see that?

9 A. Yes. I was more concerned about his attitude than his  
10 performance. So --

11 Q. And, again, that still had to do with his 2007 evaluation,  
12 right?

13 A. That's correct.

14 Q. All right. Did you send any emails or talk to Lieutenant  
15 Broach or direct him to change any other performance  
16 evaluations for Ron Evans or anybody else you supervised after  
17 that?

18 A. No. No.

19 Q. Did he ever ask you again for any assistance?

20 A. No, he didn't.

21 Q. I'm going to show you what's been marked Defense  
22 Exhibit 32. Which may have already been published.

23 MR. GERHARDSTEIN: No objection.

24 MR. GIGLIO: May I, Your Honor?

25 THE COURT: You may.

1 Q. I'm going to show you what's been marked Defense  
2 Exhibit 32. You see this evaluation of Ron Evans in April 1  
3 of '09?

4 A. That's correct.

5 Q. I'll skip around here. But do you know when you first saw  
6 this?

7 A. Yes.

8 Q. When was that?

9 A. I received a call from Internal Investigations and they  
10 said that Ron Evans had talked with HR, and it was the basis  
11 of a complaint that he had not have received his '09  
12 performance report. Lieutenant Lemons asked me if I knew, and  
13 I said I had never seen it. I called Chief Kluesener and  
14 asked him, and he said he remembered it because he had given  
15 some negative -- some negative comments on it himself.

16 Q. Okay. So he recalled it?

17 MR. GERHARDSTEIN: Objection, Your Honor.

18 MR. GIGLIO: If I may.

19 Q. You can't -- I understand what you're saying, but you  
20 can't state what someone else said --

21 A. Okay. Okay.

22 Q. -- as a general rule.

23 THE COURT: For the record, the objection is  
24 sustained.

25 THE WITNESS: Okay.

1 A. Well, I had discussion with Chief Kluesener.

2 Q. Did he confirm that -- without going into what he actually  
3 told you -- did he confirm that he recalled the --

4 A. Yes.

5 Q. All right.

6 A. How this works is, on performance reports, my unit -- you  
7 know, I would fill out my unit and then it would go to my  
8 district chief for review and then come back for signatures.

9 Q. In this particular case, I'll show you the bottom of it.  
10 Is that Chief Kluesener's signature and his comments as far as  
11 you know?

12 A. That's correct.

13 Q. First, I think I asked it, but I want to make sure I asked  
14 it for the record: Did you place any of the X's on this?

15 A. No. I didn't see this until after we had retrieved it.

16 Q. Okay. How did you retrieve it?

17 A. Well, Lieutenant Lemons came up, I said I had a problem in  
18 the past with Mark Broach, the lieutenant on that unit,  
19 keeping some paperwork in his locker and not turning it in on  
20 time. I said I haven't seen this. Chief Kluesener says he  
21 knows it was completed because it went from Mark Broach to  
22 Kluesener and back to Broach.

23 MR. GERHARDSTEIN: Objection, Your Honor. May we  
24 approach?

25 THE COURT: Yes.



1 SIDEBAR CONFERENCE:

2 MR. GERHARDSTEIN: I actually let a lot go because I  
3 just wanted to get this over with. But he asks one question  
4 and then we get a speech and the speech is a lot of hearsay.

5 And I think because these matters are contested in  
6 particular, that he should direct his questions more narrowly  
7 and the witness should answer without launching into these  
8 long speeches or else it will disrupt -- I mean, we'll be here  
9 too much.

10 MR. GIGLIO: Okay. As I attempted earlier, I'm going  
11 to instruct the witness not to engage in hearsay. I'll  
12 continue to do that and try to limit his responses to my  
13 questions. I'll just go through line-by-line and we'll cover  
14 the area.

15 MR. GERHARDSTEIN: As long as you're not leading.

16 MR. GIGLIO: Yeah, as long as I'm not leading.  
17 That's true. Is that okay?

18 MR. GERHARDSTEIN: And I think the jury should be  
19 instructed that something -- I mean, he's already just  
20 launched into a long statement about what Kluesener said. We  
21 should start over.

22 MR. GIGLIO: I don't think that's -- I'm sorry. I  
23 just don't think an instruction to the jury is necessary on  
24 that type of objection.

25 THE COURT: Are you asking to have this statement

1 stricken?

2 MR. GERHARDSTEIN: Yes. Yes, Judge.

3 THE COURT: Okay. Can you read back what his  
4 response was.

5 (At which time the court reporter read back the requested  
6 answer as follows:

7 "A. Well, Lieutenant Lemons came up, I said I had a  
8 problem in the past with Mark Broach, the lieutenant on  
9 that unit, keeping some paperwork in his locker and not  
10 turning it in on time. I said I haven't seen this. Chief  
11 Kluesener says he knows it was completed because it went  
12 from Mark Broach to Kluesener and back to Broach.")

13 THE COURT: Okay. All right. There's a lot of  
14 hearsay in that.

15 All right. I will ask -- I will strike his response and  
16 you can go over it again.

17 MR. GIGLIO: Okay. That would be fine.

18 MS. POWELL: Can we go off the record a minute?

19 (Defense Counsel confer privately.)

20 CONCLUSION OF SIDEBAR CONFERENCE

21 THE COURT: All right. At this time I'm going to  
22 strike the witness' response to the last question and instruct  
23 the jury to disregard it.

24 Also, Captain Campbell, if you could -- in the back of the  
25 courtroom it sounds like we're getting feedback from your

1 microphone. I think you're speaking too close to the  
2 microphone. So if you could speak up --

3 THE WITNESS: How's that? Is that better?

4 Q. I think --

5 MR. GIGLIO: If I may, Your Honor.

6 Q. -- I think it would be help if you weren't too close to  
7 the mike but spoke louder.

8 A. Spoke louder.

9 Q. That might eliminate the feedback we're sensing.

10 Can you try that and we'll see how that comes across?

11 Okay. Going back to the exhibit again, did you -- did you  
12 go to Lieutenant Broach's locker with Lieutenant Lemons?

13 A. That's correct. Lieutenant Lemons from Internal  
14 Investigations, right.

15 Q. And with him did you open his locker?

16 A. That is correct.

17 Q. All right. When you opened his locker, what did you find?

18 A. Found performance reports for Mr. Evans and I think three  
19 others.

20 Q. All right. And when you found those reports, had all this  
21 been included -- when I say "all this," I'm referring to the  
22 comments that apparently are attributed to Chief Kluesener.

23 Was that already on there?

24 A. Yes.

25 Q. All right. And would this have been a period when

1 Mr. Broach was out on leave in 2010?

2 A. That's correct.

3 Q. All right. Now, based on the year of these -- just this  
4 particular exhibit, I'm not talking about anything else you  
5 found in there, just this exhibit.

6 Would this evaluation be delinquent as far as time should  
7 this have been served on --

8 If you can see the date, the performance date was April  
9 '09. Would that still be in his locker after 2010?

10 A. No. No. But he wasn't on duty.

11 Q. Was Mr. Broach on duty --

12 When you say "he," are you referring to Mr. Evans or --

13 A. I'm not -- I have to think. Both --

14 So much time, I get confused. At that point Lieutenant  
15 Broach was not on duty. I believe that's why we were in his  
16 locker.

17 Q. I just want to clarify. When you say "at that point," are  
18 we talking about 2009 or 2010?

19 A. It would have been 2010.

20 Q. All right. Mr. Broach, as far as you know, was on duty in  
21 2009?

22 A. That's correct.

23 Q. And if Mr. Evans was off, obviously it wasn't given to  
24 him?

25 A. That's correct.

1 Q. But if Mr. Evans came back before the -- months before you  
2 -- months Mr. Broach took off, he had an obligation to give it  
3 to Mr. Broach?

4 A. Yes, uh-huh.

5 Q. I'm going to ask you to look at Plaintiff's Exhibit 18,  
6 which I believe has previously been published. Have you found  
7 that?

8 MR. GERHARDSTEIN: Which?

9 MR. GIGLIO: Oh, I'm sorry.

10 Q. And I'm specifically -- there's several pages here,  
11 Captain. I'm specifically referring to --

12 A. Okay.

13 Q. If you look at the bottom, there's stamped numbers that  
14 start with five zeroes. Do you see that?

15 A. Five zeroes?

16 Q. Yes.

17 A. I'm sorry.

18 Q. Okay. Don't be sorry; it's a lot of pages.

19 I believe there's various people who did reviews, but I  
20 want to ask you about reviews you did, and I believe we have  
21 it here on page 17 and page 16; 16 and 17.

22 MR. GIGLIO: I believe these have been previously  
23 published?

24 MR. GERHARDSTEIN: No.

25 MR. GIGLIO: No? I'll ask counsel if they object to

1 Bates-stamped 16 and 17 of Plaintiff's Exhibit 18.

2 MR. GERHARDSTEIN: No. No objection.

3 MR. GIGLIO: If I may, Your Honor?

4 THE COURT: You may.

5 Q. Okay. I'm going to show you page 16 of that exhibit,  
6 Captain. This appears to be a review you did of Mark Broach  
7 on April the 1st, '07. Is that correct?

8 A. That's correct.

9 Q. See where your signature --  
10 That's your signature?

11 A. Yes, sir.

12 Q. Okay. And you -- following what you just said, you put  
13 the good things as well as the bad things on the right side  
14 there?

15 A. That's correct.

16 Q. And you even gave him an Outstanding on his appearance and  
17 condition?

18 A. Yes.

19 Q. And for the year that you appraised Mr. Broach, did he  
20 have any reprimands?

21 A. No, not that year.

22 Q. And your overall appraisal was a 90?

23 A. Correct, uh-huh.

24 Q. Now, I don't see any comments. I just see that's signed  
25 by -- it appears to be Chief Kluesener. Would you agree with

1 that?

2 A. Yes.

3 Q. Okay. All right. Now I'm going to show you page 17 and  
4 this --

5 You see that one?

6 A. Yes.

7 Q. This appears to be your evaluation done in '09. You  
8 recall giving Mr. Broach an evaluation in '09?

9 A. Yes.

10 Q. All right. That's again your signature on the bottom?

11 A. That's correct.

12 Q. Okay. And this time you gave him an 80?

13 A. Uh-huh.

14 Q. I guess I should ask you first is an 80 a bad rating?

15 A. No, it's passing.

16 Q. Does it prevent anybody getting promoted?

17 A. No, it doesn't stop you from being promoted.

18 Q. Okay. But this more recent one, you dropped him ten  
19 points.

20 Can you explain why it went from 90 to 80?

21 A. Well, in the Comments and Suggestions, I detailed it  
22 there.

23 Q. Did he receive a reprimand?

24 A. Yes. He caused some problems the previous year.

25 Q. All right. And we'll ask you about some of those. But

1 would the reprimands Quality of Work and reprimands on Rules  
2 and Regulations be sufficient to lower an earlier rating of 90  
3 to 80?

4 A. Yes.

5 Q. Just that alone?

6 A. Yes.

7 Q. All right. Thank you.

8 Talking about reprimands, so why don't I ask you a few  
9 questions. I'll ask you to look at Defense Exhibit 7, please.

10 MR. GIGLIO: I can't recall if these have been  
11 previously published.

12 Does counsel have any objection?

13 MR. GERHARDSTEIN: No objection.

14 MS. BRANCH: Six and seven?

15 MR. GIGLIO: May I publish, Your Honor?

16 MR. GERHARDSTEIN: You've got seven. What else have  
17 you got?

18 MR. GIGLIO: Six. I'll start with seven.

19 Q. Let me show you a reprimand that looks like October of  
20 '08. Do you see that?

21 A. Yes.

22 Q. Slide it down. I'm sorry; I can't do it all at one time.  
23 And that's one you gave Mr. Broach?

24 A. That's correct.

25 Q. Okay. And what was the purpose of this reprimand that you



1 -- it's called Inefficiency, I believe, on the left.

2 A. We're all sort of fire inspectors. We have an inspection  
3 program. And a company commander assigns the inspection and  
4 also has the liberty to -- if you see something that needs our  
5 attention, we have permits for a typical occupancy that needs  
6 to be updated, they need to be taken care of in a certain time  
7 frame, and we had also transitioned to an automated system,  
8 computerized inspection system.

9 Two things here. There's a weekly checkoff. So if you,  
10 for instance, if you're working Monday, all you have to put is  
11 how many inspections you did Monday and then you put a copy of  
12 them in there. And at the end of the week we would review and  
13 see basically what everyone's doing for maintaining this  
14 program.

15 Now, the -- as we transitioned in this new computerized  
16 program, that was difficult for some people. But I instructed  
17 him to talk to the Inspection Bureau, which was Captains Long  
18 and Coldiron, and they would come out if anyone was having  
19 trouble and work with you and go through the system with  
20 you -- again, we all had been trained -- but bring you up to  
21 par if you were having -- if you needed attention with the new  
22 system, and none of this was being done. And I asked him a  
23 couple of times and he just neglected it and eventually it  
24 resulted in this documentation.

25 Q. Did you -- before you -- the documentation, did you

1 counsel him and ask him?

2 A. All year long. Yeah.

3 Q. And is this a reference of your prior -- what you  
4 testified earlier about paperwork getting in on time?

5 A. That's correct.

6 Q. Now, when you gave this reprimand to Lieutenant Broach, I  
7 assume you spoke to him?

8 A. Yes, uh-huh.

9 Q. Did you tell him you were giving this reprimand because he  
10 wasn't doing his job with Ron Evans?

11 A. Ron Evans, no. I gave him the reprimand because he wasn't  
12 filling out the inspection module --

13 Q. Okay.

14 A. -- weekly.

15 Q. Thank you.

16 Do you know if this went to peer review, if you know?

17 A. Yes, it did. Uh-huh.

18 Q. I'm going to show you what's been marked as Exhibit 6.

19 MR. GERHARDSTEIN: No objection.

20 MR. GIGLIO: No objection. If I may, Your Honor?

21 THE COURT: You may.

22 Q. Show you another reprimand of Mr. Broach. This one says  
23 effective date January 9, '09. Do you see it?

24 A. What's the exhibit number?

25 Q. I'm sorry. Defense Exhibit 6 in the defense book.

1 A. All right. Do you have a question?

2 Q. Yes, I do have a question.

3 Is that your signature?

4 A. Yes, uh-huh.

5 Q. And you gave Mr. Broach a reprimand regarding -- I'll pull  
6 it down.

7 Someday I'll learn how to focus this, but right now I'm  
8 going to slide it around. I apologize.

9 It has Neglect of Duty. Do you see Neglect of Duty?

10 A. Yes.

11 Q. Was this involving an accident with one of the fire  
12 apparatus vehicles?

13 A. It was our fire truck assigned to Engine 34.

14 Q. And again I'll ask you the same question. When you gave  
15 him this reprimand, did you talk to Mr. Broach?

16 A. Yes, uh-huh.

17 Q. Did you tell him "I'm giving you this reprimand because  
18 you're not doing your job with Ron Evans"?

19 A. No.

20 Q. Okay. I have to ask the questions.

21 A. Ridiculous. No, because the front bumper was turned up.  
22 He didn't report it, and he tried to -- basically was not --  
23 he was just dishonest about the whole thing. He didn't report  
24 it. And then he said he talked to one of the off-going  
25 drivers, who wasn't even on duty. So it was just ridiculous.

1 Damage was obvious. The whole bumper was turned up.

2 Q. Okay. And was this also under peer review, if you know?

3 A. Yes, uh-huh, and sustained.

4 Q. I'm going to ask you to look at Defense Exhibit 31.

5 MR. GERHARDSTEIN: No objection.

6 MR. GIGLIO: May I, Your Honor?

7 THE COURT: You may.

8 Q. Show you a third reprimand. Excuse me. See this one,  
9 Captain?

10 A. Yes.

11 Q. And this one says Effective Date May 12th, '09?

12 A. Yes.

13 Q. And I'm just looking --

14 It looks like it was served by you on May 12th, '09?

15 A. That's correct.

16 Q. And this one includes two blocks, marked 3 and 4,  
17 Inefficiency, but you also included Dishonesty. Okay?

18 Can you tell us why you included dishonesty on this?

19 A. In the morning, I was placed on overtime. We were short  
20 throughout the Fire Division so the Captain stays in the  
21 house. Mark Broach's shift was coming on, so that means he'd  
22 be displaced. I received a call for him to go to Engine 51 in  
23 College Hill. Then I received a call that there was a City  
24 Manager's meeting down at 9th and Broadway at the district  
25 headquarters and that all District 1 company had to come down.

1 We had to be there by 8 o'clock.

2 So, we were in a rush to get out and make your -- your  
3 normal checks in the day, checking your equipment, get  
4 manpower established. Told him about his detail, and then we  
5 went on down and met with the city manager at 8000. I got  
6 down there about 7:45 or so.

7 In the meantime, Engine 20 from Northside had been backed  
8 in. Since we're a single engine house, we try to keep someone  
9 staffed there at all times. So while we were Downtown on the  
10 detail, they backed in Engine 20.

11 When we got back that afternoon from the meeting, I got a  
12 call from District 1 -- I'm sorry District 3, McWilliams, and  
13 he said, "Where was Mark Broach? He wasn't at his detail." I  
14 said, "I don't know. I just assumed that he went up."

15 Well, when he had -- when Engine 20 had backed in, they  
16 told me he was sitting at the table, was doing something, and  
17 they said they thought he was supposed to be -- I'm sorry,  
18 Mark Broach was supposed to be with his company down at the  
19 City Manager's meeting, not knowing I was there. So these  
20 guys coming in, they were a little confused. They said, "Hey,  
21 what are you doing here?" He said, "I'm waiting on the call."

22 At that point, they told me he was there at the house at  
23 quarter of eight or so, that he left the building.

24 When I approached Mark about this, I said, "District 3  
25 wants to know where you were." He said, "You had me blocked

1 in. I couldn't go." I said, "That's outrageous, and I didn't  
2 have you blocked in." And we had this -- this -- I said,  
3 "Just put your comments on the sheet and if that's what you  
4 think happened, just put it on and it will run the course."

5 So he writes out a report I had him blocked in, submitted  
6 it, which was outrageous because my car was parked inside the  
7 building.

8 What we do in the mornings, nobody parks out back, so the  
9 oncoming shift has -- has a place to park. So there were no  
10 cars parked out back. No one had blocked him in. I mean, it  
11 was disturbing actually you would put something like that on a  
12 report. And at that point, you know, I gave him the reprimand  
13 for, number one, not showing up on time to College Hill, not  
14 being there, because it was a limited duty guy up there  
15 because District Chief McWilliams had called letting me know  
16 where the replacement was. And Lieutenant Broach just said,  
17 "I don't understand." And that's when he called me later on  
18 in the afternoon and said, "Where was this guy?"

19 Q. Okay. You said -- why wouldn't McWilliams sign this  
20 reprimand? Why wouldn't he give the reprimand?

21 A. Well, he didn't lie to McWilliams. He lied to me.

22 Q. But as far as not being there on time, why wouldn't he  
23 sign the reprimand?

24 A. He would have the option of doing that, but I was more  
25 concerned about the lack of integrity. I think that needed to

1 be corrected.

2 Q. Okay. This went to peer review as well?

3 A. Oh, yeah. Yeah. Yes.

4 Q. I have to ask the same question. You spoke to him about  
5 this?

6 A. Oh, yes. Uh-huh.

7 Q. And when you spoke to him, did you tell him "You're  
8 getting this reprimand because you're not doing your job with  
9 Evans when I told you" --

10 A. "You're getting this reprimand because you're lying to  
11 me." Had nothing to do with Ron Evans.

12 Q. Thank you.

13 A. It was ridiculous.

14 MR. GIGLIO: I could do another five minutes if you  
15 wish, Your Honor.

16 THE COURT: Will that conclude?

17 MR. GIGLIO: No, it wouldn't conclude.

18 THE COURT: Then you have five more minutes.

19 MR. GIGLIO: All right.

20 Q. Did you ever threaten or state to Mark Broach that "I'll  
21 destroy your career"?

22 A. No. That's ridiculous.

23 Q. Okay. Did --

24 A. I don't even know what that means. I mean, how do you  
25 destroy someone's career? Firefighters know good

1 firefighters. You know, your reputation is established by the  
2 guy or the girl standing to the left and right of you inside a  
3 burning building. That's where your reputation is  
4 established. It's not established by me or you or the next  
5 guy saying anything about that person.

6 If you're getting down and dirty and getting after it,  
7 which is what this job is all about, that's where your  
8 reputation's established.

9 I could say anything about anybody and it's not going to  
10 mean nothing. What matters is, is the person standing on the  
11 left and right of you that's putting themselves in harms way.  
12 That's what matters. They're the ones that decide what kind  
13 of person you are.

14 Q. Did Mark Broach ever tell you he didn't want to discipline  
15 Ron Evans because he thought it was discriminatory?

16 A. No.

17 Q. Did you ever tell Mark Broach "You need to get rid of Ron  
18 Evans because he has filed a discrimination claim against you  
19 in the past"?

20 A. That's absolutely ridiculous.

21 Q. All right. Has any other members of your company  
22 complained to the chief that you were racially intolerant or  
23 told racially-charged jokes?

24 A. My whole company is African-American. I have in my house  
25 my -- under my immediate supervision --



1 MR. GERHARDSTEIN: Objection, Your Honor.

2 MR. GIGLIO: Well --

3 THE COURT: If you don't want a sidebar, that's fine.  
4 I'll sustain the objection and you can rephrase.

5 MR. GIGLIO: I won't ask for a sidebar.

6 Q. Without going into your reasonings, and I can ask you  
7 about that, I'll limit my question to you.

8 Did any of those other African-Americans who work with  
9 you, did any of those ever comment to some higher authority in  
10 the Fire Department, the chief or someone else, that you were  
11 racially intolerant or engaged in racially-charged jokes?

12 MR. GERHARDSTEIN: Objection, Your Honor.

13 THE COURT: Sustained.

14 Q. Did you ever become aware of any complaints made by any of  
15 your firefighters that work with you that you were either  
16 racially intolerant or told racially-charged jokes?

17 A. No.

18 Q. Did you ever become aware of that?

19 A. No.

20 MR. GIGLIO: I'm going back to the --

21 I'm going to start a new area, Your Honor.

22 THE COURT: Sure. We can take a break now. Sure.

23 We're going to take our lunch recess. I understand you  
24 are willing to take a shorter lunch. Is that correct?

25 JUROR NO. 4: (Nods head affirmatively.)

1           THE COURT:   Okay.   All right.

2           We're about to take a recess.   I'm going to again remind  
3 you of our same instruction.

4           During this recess or any other, you must not discuss the  
5 case with anyone, including your fellow jurors, members of  
6 your family, anyone involved in this case or anyone else.

7           Should anyone try to contact you and try to talk to you  
8 about the case, you must immediately notify me, Ms. Lahley, or  
9 the Court Security.

10          Now, you're not to read, watch or listen to any news  
11 reports about this case.   Do not get on the Internet to  
12 research the case or talk about the case through blogs or  
13 chatrooms or any other social media applications.

14          And, finally, keep an open mind until you receive all the  
15 evidence and listen to the views of your fellow jurors.   It's  
16 about 12:30.   Let's take a half hour lunch break, and I'll  
17 have Jan check in with you at one.   If you're done eating, if  
18 you guys need a few more minutes, that's fine, but try to keep  
19 it around a half hour.   Thank you.

20          All right.   You may step down.

21                 THE WITNESS:   Thank you.

22                 THE COURT:   Thank you.

23                 (Witness temporarily excused.)

24                 MR. GIGLIO:   Thank you, Your Honor.

25                 (At 12:30 p.m., the luncheon recess was taken.)

I N D E X

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MORNING SESSION CONCLUDED

- - -

I N D E X

<u>PLAINTIFF'S WITNESS:</u>	<u>D</u>	<u>C</u>	<u>RD</u>	<u>Questions</u>	<u>Furt. Exam</u>
<b>LT. DAVID A. LEMONS (cont'd.)</b>	2	30	72	78	86
<b>CAPT. KEVIN A. CAMPBELL</b>	89	(continued to the afternoon)			

E X H I B I T S

	<u>Identified</u>
DX 4	2
JX V	27
JX VI	28
PX 39	43
PX 40	43
PX 41	43
DX 4	50
PX 27	62
DX 25	92
DX 7	103
DX 2	102
DX 3	107
DX 32	110
PX 18	117

C E R T I F I C A T E

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DX 7	120
DX 6	122
DX 31	124

\* \* \*

C E R T I F I C A T E

I, Mary Ann Ranz, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Mary Ann Ranz  
Official Court Reporter